

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

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## **Matter No S146/2024**

JOHN BRUCE KAIN

APPELLANT

AND

R&B INVESTMENTS PTY LTD AS TRUSTEE FOR  
THE R&B PENSION FUND & ORS

RESPONDENTS

## **Matter No S144/2024**

ERNST & YOUNG (A FIRM)

APPELLANT

AND

R&B INVESTMENTS PTY LTD AS TRUSTEE FOR  
THE R&B PENSION FUND & ORS

RESPONDENTS

## **Matter No S143/2024**

ROBERT WARNER SHAND

APPELLANT

AND

R&B INVESTMENTS PTY LTD AS TRUSTEE FOR  
THE R&B PENSION FUND & ORS

RESPONDENTS

*Kain v R&B Investments Pty Ltd*  
*Ernst & Young (a firm) v R&B Investments Pty Ltd*  
*Shand v R&B Investments Pty Ltd*  
[2025] HCA 28  
*Date of Hearing: 4 & 5 March 2025*  
*Date of Judgment: 6 August 2025*  
S146/2024, S144/2024 & S143/2024



## ORDER

### **Matter No S146/2024:**

1. *Appeal allowed.*
2. *Set aside paragraphs 2 and 3 of the Orders of the Full Court of the Federal Court of Australia made on 5 July 2024 and, in their place, order that:*
  - (a) *the question reserved in paragraph 1 of the Orders of the Full Court made on 5 July 2024 be answered:*

*"Where the solicitor acting for the representative party or a group member is subject to the Legal Profession Uniform Law (NSW), then the Federal Court of Australia may not make an order under s 33V(2) or s 33Z(1)(g) of the Federal Court of Australia Act 1976 (Cth) that an amount be paid to or for the benefit of the solicitor calculated by reference to the amount that might be or is to be paid under a settlement or an award of damages or the value of any property that may be recovered in the proceedings. The question is otherwise inappropriate to answer.";* and
  - (b) *the applicants pay the second, ninth and twelfth respondents' costs of and incidental to the hearing of the reserved question.*
3. *The first and second respondents pay the appellant's and the fourth and fifth respondents' costs of the appeal.*

### **Matter No S144/2024:**

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2. *Set aside paragraphs 2 and 3 of the Orders of the Full Court of the Federal Court of Australia made on 5 July 2024 and, in their place, order that:*
  - (a) *the question reserved in paragraph 1 of the Orders of the Full Court made on 5 July 2024 be answered:*



*"Where the solicitor acting for the representative party or a group member is subject to the Legal Profession Uniform Law (NSW), then the Federal Court of Australia may not make an order under s 33V(2) or s 33Z(1)(g) of the Federal Court of Australia Act 1976 (Cth) that an amount be paid to or for the benefit of the solicitor calculated by reference to the amount that might be or is to be paid under a settlement or an award of damages or the value of any property that may be recovered in the proceedings. The question is otherwise inappropriate to answer."; and*

- (b) *the applicants pay the second, ninth and twelfth respondents' costs of and incidental to the hearing of the reserved question.*
- 3. *The first and second respondents pay the appellant's and the fourth and fifth respondents' costs of the appeal.*

**Matter No S143/2024:**

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- 2. *Set aside paragraphs 2 and 3 of the Orders of the Full Court of the Federal Court of Australia made on 5 July 2024 and, in their place, order that:*
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4.

*(b) the applicants pay the second, ninth and twelfth respondents' costs of and incidental to the hearing of the reserved question.*

3. *The first and second respondents pay the appellant's and the fourth and fifth respondents' costs of the appeal.*

On appeal from the Federal Court of Australia

### **Representation**

R M Foreman SC with R K Jameson for the appellant in S146/2024, the fourth respondent in S143/2024 and the fifth respondent in S144/2024 (instructed by Arnold Bloch Leibler)

M R Hodge KC with G B Westgarth for the appellant in S143/2024 and the fourth respondent in S144/2024 and S146/2024 (instructed by GRT Lawyers)

S A Lawrance SC with A E Smith for the appellant in S144/2024 and the fifth respondent in S143/2024 and S146/2024 (instructed by Corrs Chambers Westgarth)

J T Gleeson SC and S H Hartford Davis with D S Morris and O J Ronan for the first and second respondents in each appeal (instructed by Banton Group and Shine Lawyers)

C L Lenehan SC with R Harvey for the Association of Litigation Funders of Australia, intervening in S146/2024 (instructed by William Roberts Lawyers)

Submitting appearance for the third respondent in each appeal

No appearance for the sixth to ninth respondents in each appeal

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.





## CATCHWORDS

**Kain v R&B Investments Pty Ltd**

**Ernst & Young (a firm) v R&B Investments Pty Ltd**

**Shand v R&B Investments Pty Ltd**

Practice and procedure – Representative action – Orders – Where s 33V(2) of *Federal Court of Australia Act 1976* (Cth) provides that in representative proceedings Federal Court may make such orders as are just with respect to distribution of any money paid under settlement or paid into Court – Where s 33Z(1)(g) of *Federal Court of Australia Act* provides Court may in determining matter in representative proceeding make such other order as Court thinks just – Where s 183 of *Legal Profession Uniform Law* (NSW) provides law practice must not enter into costs agreement under which amount payable is calculated by reference to amount of any award or settlement – Where applicants in representative proceeding proposed to provide notice of intention to seek common fund order in favour of law practice at settlement or judgment – Where costs agreements to be amended to provide for common fund order in favour of law practice if notice approved – Whether s 33V or s 33Z of *Federal Court of Australia Act* empowers Federal Court to make common fund order at settlement or judgment in favour of law practice.

Words and phrases – "commencement CFO", "common fund order", "concept of justice", "contingency fee", "costs agreement", "distribution", "federal jurisdiction", "funding commission", "funding equalisation order", "group costs order", "just", "legal costs", "litigation funding", "new legal rights", "payment for costs and disbursements", "regulation of the legal profession", "remuneration for risk", "representative proceeding", "requirements of State law", "settlement CFO", "solicitors' CFO", "solicitors' common fund order".

*Federal Court of Australia Act 1976* (Cth), Pt IVA, ss 33J, 33V, 33Z, 33ZF, 33ZJ. *Legal Profession Uniform Law* (NSW), ss 3, 6, 169, 172, 179, 180, 181, 182, 183, 185.



1 GAGELER CJ. Funded representative proceedings constitute a form of civil litigation the prevalence of which has increased and the incidents of which have varied over the two decades since litigation funding was held to be permissible in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*.<sup>1</sup> The litigious form of the funded representative proceeding has attracted coteries of specialist legal practitioners and has led to the establishment within courts of panels of specialist judges. Together, they have developed specialist terminology incomprehensible to the non-cognoscenti.

2 These appeals are from a judgment of the Full Court of the Federal Court of Australia (Murphy, Beach and Lee JJ)<sup>2</sup> which determined a question reserved under s 25(6) of the *Federal Court of Australia Act 1976* (Cth) ("the FCA"). The question was reserved in consolidated representative proceedings in the original jurisdiction of the Federal Court under Pt IVA of the FCA. Cutting through the jargon, the question can be restated in two parts. The first part is general; the second part is specific.

3 The general part of the question is this: does the Federal Court have power, under s 33V(2) of the FCA (in the event of a representative proceeding being concluded by settlement) or under s 33Z(1)(g) of the FCA (in the event of a representative proceeding being concluded by judgment), to make an order that requires all members of the group on whose behalf the representative proceeding has been commenced, who have not opted out of the proceeding by the date fixed under s 33J and notified under s 33X, to contribute equally to payment to a litigation funder of a funding commission which contains a premium for litigation risk and which is calculated as a percentage of the settlement or judgment sum? In the vernacular of the speciality, an order of that kind is known as a "common fund order" or "CFO".

4 The making of a CFO under s 33V(2) of the FCA, in the form of an order authorising and requiring payment to a litigation funder out of a settlement fund of a specified amount or of an amount to be calculated in a specified way, has in practice become commonplace in the five years since *BMW Australia Ltd v Brewster* ("*Brewster*")<sup>3</sup> and has come to be known as a "settlement CFO". A CFO

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1 (2006) 229 CLR 386.

2 *R&B Investments Pty Ltd v Blue Sky Alternative Investments Ltd (In liq)* (2024) 304 FCR 395.

3 (2019) 269 CLR 574. See, eg, *Uren v RMBL Investments Ltd [No 2]* [2020] FCA 647; *Webster (Trustee) v Murray Goulburn Co-operative Co Ltd [No 4]* [2020] FCA 1053; *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd [No 3]* (2020) 385 ALR 625; *Bradshaw v BSA Ltd [No 2]* [2022] FCA 1440; *Haswell v The Commonwealth*

under s 33Z(1)(g) authorising and requiring payment to a litigation funder out of a judgment sum has been described by parity of language as a "judgment CFO".<sup>4</sup>

5       The specific part of the question only arises if an affirmative answer is given to the general part of the question. That is to say, the specific part of the question only arises if the Federal Court has power to make a CFO under s 33V(2) and s 33Z(1)(g) of the FCA.

6       The specific part of the question is this: does the power of the Federal Court to make a CFO under s 33V(2) and s 33Z(1)(g) extend to making a CFO in circumstances where the litigation funder is a law practice regulated by the *Legal Profession Uniform Law* (NSW) ("the Legal Profession Uniform Law") as given force by the *Legal Profession Uniform Law Application Act 2014* (NSW)?

7       The making of a CFO in such circumstances would be novel.<sup>5</sup> In the course of the consolidated representative proceedings in the Federal Court in which the question was reserved for determination by the Full Court, a settlement CFO or judgment CFO putatively made in such circumstances came to be known as a "solicitor's CFO".

8       The Full Court answered both parts of the question reserved in the affirmative.<sup>6</sup> In relation to the general part of the question, the Full Court followed its earlier decision in *Elliott-Cardé v McDonald's Australia Ltd*<sup>7</sup> in considering that the Federal Court has power under s 33V(2) and s 33Z(1)(g) of the FCA to make a CFO upon settlement or judgment.<sup>8</sup> Building on that earlier decision in relation

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[No 3] [2023] FCA 1093; *Ghee v BT Funds Management Ltd* [2023] FCA 1553; *Ingram v Ardent Leisure Ltd* [2024] FCA 836; *Galactic Seven Eleven Litigation Holdings LLC v Davaria* (2024) 302 FCR 493; *Street v Western Australia* [2024] FCA 1368; *Boulos v M.R.V.L. Investments Pty Ltd* [2024] FCA 1377.

4       See, eg, *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501 at 506 [19].

5       But see *Impiombato v BHP Billiton Ltd* [No 2] (2018) 364 ALR 162 at 176 [64]-[65], 194 [133], considered in *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Ltd* (2019) 369 ALR 583 at 587-588 [16]-[23], 612 [139].

6       (2024) 304 FCR 395 at 423 [133].

7       (2023) 301 FCR 1.

8       (2024) 304 FCR 395 at 407 [56].

3.

to the specific part of the question, the Full Court considered those powers to make such a CFO sufficient to encompass power to make a solicitor's CFO.<sup>9</sup>

9       The consequence of the judgment of the Full Court embodying those answers for the conduct of the consolidated representative proceedings is to pave the way for the inclusion in a notice to group members to be approved by the Federal Court under s 33X of the FCA of a statement of the intention of the applicants to seek a solicitor's CFO in the event of settlement or judgment. Against the background described by Gordon, Steward, Gleeson and Beech-Jones JJ and by Jagot J, the solicitor's CFO to be so sought by the applicants in the consolidated proceedings in the event of settlement or judgment would be governed by the terms of the written contract of retainer between the applicants and their solicitors, as those terms would come by agreement to be amended upon the making of the order for the giving of the notice. The precise form of the solicitor's CFO to be sought in accordance with the terms of the retainer as amended would be that the solicitors be paid out of the settlement or judgment sum such amount (being not greater than 30% of the settlement or judgment sum) as the Federal Court considers at the time of making the CFO to be fair and reasonable in all the circumstances in addition to professional costs and disbursements incurred by the solicitors in acting for the applicants.

10       In my opinion, the Full Court's answer to the general part of the question was correct. The power conferred on the Federal Court by s 33V(2) of the FCA, to "make such orders as are just with respect to the distribution of any money paid under a settlement", is broad enough to empower the Federal Court to make a settlement CFO. Likewise, the power conferred on the Federal Court by s 33Z(1)(g) of the FCA, to "make such other order as the Court thinks just" in "determining a matter in a representative proceeding", is broad enough to empower the making of a judgment CFO. In the terminology of the separate question, the making of a CFO is "licit".

11       In my opinion, however, the Full Court's answer to the specific part of the question was incorrect. My view is that an order under s 33V(2) or s 33Z(1)(g) of the FCA could not properly be thought "just" if seeking or giving effect to the order would involve a contravention of the Legal Profession Uniform Law. The making of the solicitor's CFO foreshadowed in the present case would not be "just" according to that standard. That is because, to provide in the terms of the written retainer, as proposed to be amended upon the making of the order under s 33X for the giving of notice to group members, for the applicant to apply to the Federal Court for the solicitor's CFO would involve the solicitors in a contravention of s 183 of the Legal Profession Uniform Law. In the terminology of the separate question, the making of the solicitor's CFO would be "illicit".

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9       (2024) 304 FCR 395 at 406-407 [53], 410 [69], 412 [72], 414 [85], 421 [120].

**CFO**

12 With the support of the Association of Litigation Funders of Australia, which applied for and was granted unopposed leave to intervene in the appeals, those of the parties who sought to defend the Full Court's determination of the question reserved pursued an application to reopen *Brewster*. However, the correctness of *Brewster* does not squarely arise in the appeals, and the application to reopen *Brewster* is for that reason inappropriate to be considered.

13 The holding in *Brewster* was that s 33ZF of the FCA does not empower the making of an order of a kind there described as a "CFO",<sup>10</sup> but which has since and in retrospect been described with more precision as a "commencement CFO" to distinguish it from a "settlement CFO" or a "judgment CFO".<sup>11</sup> The commencement CFO there in question was an interlocutory order made on the application of a representative applicant and in accordance with the terms of a funding agreement between the applicant and a litigation funder, before the fixing of an opt-out date under s 33J, by force of which the applicant and group members were to be required to pay to the litigation funder out of any settlement or judgment sum amounts by way of reimbursement for funded costs and funding commission (which included a premium for litigation risk) as were identified in the funding agreement.

14 The essential reason for the holding that s 33ZF of the FCA does not empower the making of an order of that kind given by all members of the majority in *Brewster* was that the power the section confers to "make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding" is limited to making an order directed to the just and efficient resolution of an issue that has arisen between the parties in a representative proceeding. The majority considered that the making of a commencement CFO was beyond the scope of the power so limited because the central concern of an applicant seeking such an order was with the "radically different" question of whether the representative proceeding which had been commenced but which had not been determined was a viable vehicle for the doing of justice between the parties at all.<sup>12</sup>

15 Neither the holding in *Brewster* concerning the limited scope of the power conferred by s 33ZF of the FCA nor the reason for that holding has any impact on the present question of whether the making of a CFO in the form of a "settlement CFO" or a "judgment CFO" is empowered by differently worded provisions operating within the scheme of Pt IVA at a different and later stage of a

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10 (2019) 269 CLR 574 at 589 [3].

11 See, eg, *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501 at 506 [19].

12 (2019) 269 CLR 574 at 589 [3], 599-600 [47], 624 [125], 633 [153]-[154].

representative proceeding, those provisions being s 33V(2), operating only if there is a settlement, and s 33Z(1)(g), operating only if there is a judgment.

16 No party disputed the application to each of s 33V(2) and s 33Z(1)(g) of the FCA of the general principle of construction that makes it "inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words".<sup>13</sup> That is hardly surprising given the observation in *Wong v Silkfield Pty Ltd*<sup>14</sup> that "[l]ike other provisions conferring jurisdiction upon or granting powers to a court, Pt IVA is not to be read by making implications or imposing limitations not found in the words used" and that "this is so even if the evident purpose of the statute is to displace generally understood procedures".

17 Rather, once *Brewster* was put to one side, the argument of those of the parties who sought to challenge the Full Court's determination of the question reserved by denying the power of the Federal Court to make any CFO at all under s 33V(2) or s 33Z(1)(g) of the FCA was reduced to the proposition that the power conferred by each of those provisions was not to be read as a power to create and confer a new legal right on a third party based on a norm of what is "just", but rather as a power to give effect to an entitlement arising at law or in equity. By reason of that inherent limitation, so the argument went, the powers do not extend to conferring a right to payment on a litigation funder against unfunded group members with whom the litigation funder is not in a contractual or other relationship recognised at law or in equity.

18 The argument accordingly treated the powers conferred by ss 33V(2) and 33Z(1)(g) of the FCA, to "make such orders as are just with respect to the distribution of any money paid under a settlement" and to "make such other order as the Court thinks just" in "determining a matter in a representative proceeding" respectively, as akin to the power conferred by s 16(1)(d) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to make any order directing any party to do or refrain from doing an act or thing "which the court considers necessary to do justice between the parties". In *Johns v Australian Securities Commission*,<sup>15</sup> that power was construed not to "set the Court on an uncharted course without legal reference points by which to steer"<sup>16</sup> but merely to authorise the making of an order against a party only if a ground for relief under the general law was established

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13 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at 279 [17].

14 (1999) 199 CLR 255 at 260-261 [11].

15 (1993) 178 CLR 408.

16 (1993) 178 CLR 408 at 433.

against that party, the word "justice" being taken to mean "justice according to law".<sup>17</sup>

19 The context in which ss 33V(2) and 33Z(1)(g) of the FCA will have scope to operate, where group members on whose behalf a representative proceeding has been pursued to settlement or judgment stand to benefit from the settlement or judgment without necessarily having incurred the costs and without necessarily having been exposed to litigation risk, tells against confining what is "just" within the meaning of those provisions to what is necessary or appropriate to give effect to an entitlement arising at law or in equity. Especially when regard is had to the equitable procedures which Pt IVA was designed to supersede,<sup>18</sup> the concept of what is "just" in those provisions cannot be conceived of so narrowly as to deny the Federal Court the capacity to recognise and, where appropriate, compensate a third party for what that third party has done and risked in bringing into existence the settlement or judgment from which the group members stand to benefit.

20 Nothing in the text or structure of s 33V(1) and (2) or s 33Z(1) and (2) compels a narrower reading so as to confine those provisions to making orders necessary to do justice only between group members or parties to the representative proceeding. Nor is a narrower reading suggested by the presence of s 33ZJ, which by s 33ZJ(2) confers a specific power on the Federal Court to order payment of a representative party's anticipated costs out of damages that have been awarded and by s 33ZJ(3) itself empowers the Federal Court on an application under that section to "make any other order it thinks just".

21 What is "just" for the purposes ss 33V(2) and 33Z(1)(g) is not confined to what is independently required at law or in equity. What is "just" for the purposes of those provisions can encompass recognising and compensating from the settlement or judgment to be distributed amongst group members those whose efforts have resulted in the coming into existence of the settlement or judgment that is to be distributed amongst group members.

22 The making of a CFO, in the sense of a settlement CFO under s 33V(2) of the FCA or a judgment CFO under s 33Z(1)(g) of the FCA, is permissible even though, on the authority of *Brewster*, the making of a commencement CFO under s 33ZF of the FCA is not.

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17 (1993) 178 CLR 408 at 434.

18 See, eg, *Batten v Wedgwood Coal and Iron Co* (1884) 28 Ch D 317 at 325; *In re New Zealand Midland Railway Company* [1901] 2 Ch 357 at 362, 367.



### Solicitor's CFO

23 In *P v P*,<sup>19</sup> four members of this Court explained that a "law of the Parliament conferring jurisdiction upon a federal court in general terms will, in the absence of a clear legislative intent to the contrary, ordinarily be construed as not intended to confer jurisdiction to make an order authorizing or requiring the doing of an act which is specifically prohibited and rendered criminal by the ordinary criminal law of the State or Territory in which the act would be done". The explanation continued that "the reason why a law conferring jurisdiction in general terms is to be construed in the manner indicated is that it is ordinarily to be presumed that it is the intent of the Parliament that jurisdiction conferred in general terms will be exercised in the context of, and within the confines imposed by, the ordinary criminal law of the relevant State or Territory". A reference to the doing of an act specifically prohibited by a law of the State or Territory operating within a general field of regulation can be added, for essentially the same reason, to the reference in that statement of principle to the doing of an act specifically prohibited and rendered criminal by the ordinary criminal law of the State or Territory.<sup>20</sup>

24 One such general field of regulation in which State and Territory laws operate is the regulation of the legal profession, which characteristically involves "legislative frameworks for disciplining practitioners under the supervision of the Supreme Courts of the States and Territories".<sup>21</sup> The FCA is framed on the assumption of the continuing application of those laws to legal practitioners retained by parties to proceedings before the Federal Court. That is confirmed by provisions of the *Judiciary Act 1903* (Cth) which make the entitlement of a legal practitioner to practise and appear in a federal court ordinarily dependent on the legal practitioner being admitted and having a current entitlement to practise in the Supreme Court of a State or Territory.<sup>22</sup>

25 Thus, whilst the power of the Federal Court to make any CFO under s 33V(2) or s 33Z(1)(g) of the FCA is not limited to making an order which gives effect to an entitlement arising at law or in equity, the discretion conferred on the Federal Court to make any such CFO would not be properly exercised if doing so would not be "just". An order, the seeking of or giving effect to which would

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19 (1994) 181 CLR 583 at 602.

20 See *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 35-36 [41]-[43].

21 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 396 [186], quoting *De Pardo v Legal Practitioners Complaints Committee* (2000) 97 FCR 575 at 596 [53].

22 Sections 55B and 78.

involve contravention of a State or Territory law regulating the legal profession in that State or Territory, although not beyond power,<sup>23</sup> would not properly be thought of as "just".

26        Though the argument on the appeals ranged more widely, it is not necessary for the resolution of the appeals to go beyond an examination of the operation of s 183 of the Legal Profession Uniform Law. That section,<sup>24</sup> as recently noted in *Bogan v Estate of Smedley*,<sup>25</sup> provides that a law practice "must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates". Contravention of that prohibition by a law practice exposes the law practice to a civil penalty,<sup>26</sup> is capable of constituting "unsatisfactory professional conduct or professional misconduct" on the part of a principal of the law practice or any legal practitioner associate involved in the contravention<sup>27</sup> and renders the costs agreement void.<sup>28</sup>

27        The written contract of retainer between the applicants and their solicitors answers the description of a "costs agreement" for the purposes of the Legal Profession Uniform Law and would continue to answer that description even as it is proposed to be amended. That is because it relates and would continue to relate to "legal costs"<sup>29</sup> ("legal costs" being relevantly "amounts that a person has been or may be charged by, or is or may become liable to pay to, a law practice for the provision of legal services"<sup>30</sup> and "legal services" being "work done, or business transacted, in the ordinary course of legal practice"<sup>31</sup>). Whether the amount (being not greater than 30% of the settlement or judgment sum) which the applicants would seek to become payable to the solicitors by force of a solicitor's CFO to be made under s 33V(2) or s 33Z(1)(g) of the FCA on application to the Federal Court

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23    See *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 616.

24    Section 183(1).

25    (2025) 99 ALJR 619.

26    Section 183(1).

27    Section 183(3).

28    Section 185(1).

29    Section 180(4).

30    Section 6(1) (definition of "legal costs").

31    Section 6(1) (definition of "legal services").

in accordance with the retainer as proposed to be amended would itself meet the description "legal costs" need not be determined. Either way, the amount would answer the description in s 183 of the Legal Profession Uniform Law of an "amount" or "part of [an] amount" that would be "payable to the law practice" and that would be "calculated by reference to the amount of any award or settlement ... that may be recovered in any proceedings to which the agreement relates".

28       The issue on which the application of the prohibition in s 183 of the Legal Profession Uniform Law turns is whether such an amount would be payable "under" the costs agreement if the solicitor's CFO to be applied for by the applicants were to be made by the Federal Court under s 33V(2) or s 33Z(1)(g) of the FCA. In my opinion, it would.

29       The crux of the Full Court's reasoning to the contrary conclusion is contained in the observation it made in relation to the retainer as proposed to be amended that "[t]here is no promise to pay any amount; a promise *to make an application* for an order directing approved remuneration on a particular basis is a quite distinct notion".<sup>32</sup> I accept the distinction drawn. But I cannot regard the distinction as determinative.

30       Like most prepositions, the word "under" is mutable and must be contextually and purposively construed. In the context of s 183 of the Legal Profession Uniform Law, the word connotes a relationship between the costs agreement and the amount that is payable to the law practice. Nothing in the context indicates that the relationship connoted is confined to one in which the obligation to pay the amount has its immediate source in the contractual force of the costs agreement. Significant in that respect is that s 183, read in light of s 180(1), does not specify whom the amount in question might be payable by and does not in terms confine the amount payable to an amount payable by the client or another person who is party to the costs agreement. The section therefore does not in terms exclude an amount payable by a group member in a representative proceeding with whom the law practice has no contractual relationship.

31       As to purpose, s 183 is located in Pt 4.3 of the Legal Profession Uniform Law, the stated objects of which include "to ensure that clients of law practices are able to make informed choices about their legal options and the costs associated with pursuing those options" and "to provide that law practices must not charge more than fair and reasonable amounts for legal costs".<sup>33</sup> It is more consonant with those objects to understand the relationship connoted by the word "under" in the section as encompassing not only circumstances where the obligation to pay is "created by" the costs agreement but also circumstances where the obligation to

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32   (2024) 304 FCR 395 at 414 [85] (emphasis in original).

33   Section 169.

pay is brought into existence "in accordance with, pursuant to or under the authority"<sup>34</sup> of the costs agreement. That, I am convinced, is the preferable construction.

32           Accordingly, in my opinion, to make provision in the contract of retainer for the applicants to apply to the Federal Court for a solicitor's CFO would involve the solicitors in a contravention of s 183 of the Legal Profession Uniform Law. For that reason, it would not be "just" to make the solicitor's CFO under either s 33V(2) or s 33Z(1)(g) of the FCA.

### **Conclusion and orders**

33           The appeal should be allowed, and the consequential orders proposed by Gordon, Steward, Gleeson and Beech-Jones JJ should be made.

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34   Compare *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 at 249.

34 GORDON, STEWARD, GLEESON AND BEECH-JONES JJ. Can the Federal Court of Australia make orders under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) ("the FCA Act"), upon the settlement of or judgment in a representative proceeding, to approve the distribution of a sum described as a funding commission calculated as a percentage of the sum recovered in favour of a litigation funder or a law practice conducting the proceeding on behalf of the representative party?

35 As these reasons will explain, under ss 33V(2) and 33Z(1)(g) in Pt IVA of the FCA Act, the Federal Court can make such an order in favour of a litigation funder but not a law practice conducting the representative proceeding. The Federal Court exercises power in federal jurisdiction against the background of the scheme of regulation of the legal profession in the State or Territory in which the solicitors in the proceeding are practising.<sup>35</sup> Where, as in these appeals, the solicitors are practising in New South Wales, s 183 of the *Legal Profession Uniform Law* (NSW) ("the LPUL") prohibits contingency fees.<sup>36</sup> The Federal Court cannot make such an order in favour of the law practice conducting the representative proceeding because to do so would be contrary to s 183.

## Background

36 Representative proceedings were brought in the Federal Court under Pt IVA of the FCA Act by the first and second respondents, R&B Investments Pty Ltd and Mr David Furniss ("the Applicants"), against Blue Sky Alternative Investments Limited (In liq) ("Blue Sky"), the third respondent, and some of Blue Sky's former directors (Mr John Kain and Mr Robert Shand) and Blue Sky's former auditor, Ernst & Young ("EY"). The Applicants initially each brought competing representative proceedings. R&B Investments was represented by Banton Group, and Mr Furniss by Shine Lawyers. The proceedings were consolidated ("the Consolidated Proceeding").<sup>37</sup>

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35 See *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 352 [32].

36 The LPUL is applied as a law of New South Wales by the *Legal Profession Uniform Law Application Act 2014* (NSW), s 4.

37 See *R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Ltd (Administrators Appointed) (In liq) (Carriage Application)* [2022] FCA 1444; *R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Ltd (Administrators Appointed) (In liq) (Carriage Application No 2)* [2023] FCA 142.

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37 Banton Group and Shine Lawyers ("the Solicitors") reached an "in principle" agreement to effectuate that consolidation and for the conduct of the Consolidated Proceeding. They agreed upon the terms of a proposed "cooperative litigation protocol" ("the Protocol") that it is envisaged the Applicants will execute and the terms of a proposed "consolidation agreement" that the Solicitors will execute ("the Consolidation Agreement"). If executed, the Protocol will document the manner in which the Applicants and the Solicitors are to conduct the Consolidated Proceeding. The Protocol will also record that the Applicants "have each given their instructions to be joint representative applicants in the Consolidated Proceeding" and that they consider that the Protocol "serves to benefit Group Members". Clause 5.1 of the Protocol records that the Applicants will request the Federal Court:

- "a) at an appropriate stage of the proceeding – to make orders that or to the effect that:
  - i legal costs and disbursements be shared among the Applicants and Group Members (**Claimants**) on a costs-equalisation basis (for instance, but without limitation, under section 33ZJ of the [FCA] Act):
  - ii [the Solicitors] be further remunerated for their risks in funding the legal costs and disbursements by payment of such percentage of the Resolution Sum as may be approved by the Court (**Solicitors' Common Fund Order** or **Solicitors' CFO**); and
- b) as early as practicable in the proceeding – orders that notice be given to the Claimants of the matters in (a) hereof."

"Resolution Sum" is defined to mean the sum recovered as a result of the Consolidated Proceeding.<sup>38</sup>

38 In default of orders pursuant to cl 5.1(b), under the Protocol the Applicants agree to seek orders for the transfer of the Consolidated Proceeding to the Supreme Court of Victoria and, upon such transfer, a group costs order ("GCO") pursuant

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38 See [44] below.

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to s 33ZDA of the *Supreme Court Act 1986* (Vic)<sup>39</sup> or, alternatively, to seek commercial litigation funding.

39 If executed, the Consolidation Agreement will record, among other things, that the Applicants have reached agreement in principle to consolidate the proceedings and that that agreement was recorded in a Protocol executed by the Applicants. The recitals also record that the Protocol authorised and directed the Solicitors to prepare terms governing the joint carriage of the Consolidated Proceeding and that the Solicitors had agreed to share carriage on the terms set out in the Consolidation Agreement.

40 On 10 March 2023, to facilitate performance of the Protocol and the Consolidation Agreement when they are executed, the Applicants filed an interlocutory application seeking the Federal Court's approval to distribute a notice to group members ("the Proposed Notice") pursuant to ss 33X and 33Y of the FCA Act which stated:

"The solicitors for the Applicants are financing these proceedings, by paying lawyers in their employ as well as barristers and other experts, and by taking on the financial risks of conducting the proceeding, including by indemnifying the Applicants against adverse costs, and furnishing any security for costs ordered by the Court.

If a settlement or judgment in the Class Action results in compensation being payable to you, the Applicants will ask the Court (who has the power to make the below orders) to make an order that a portion of the compensation be used to remunerate the [Solicitors] for the value of their work, the expenses and outgoings (disbursements) they incurred, and the financial risks they took, in running the Class Action (a **Solicitors' CFO**). If it makes a Solicitors' CFO, the Court has power to decide what portion of the compensation should be paid to the solicitors, and will set a proportion that the Court considers fair and reasonable in all the circumstances. The solicitors will not ask the Court to approve an amount that is greater than what a third party litigation funder would seek for funding this proceeding, which is up to 30% of the total recovery plus reimbursement of its out-of-pocket costs.

Some group members have previously entered 'litigation funding agreements' with International Litigation Partners No 10 Pte Ltd [('ILP']).

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39 See *Bogan v Estate of Smedley* (2025) 99 ALJR 619 at 623 [1].

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If the Solicitors' CFO is made, it will wholly replace the ILP funding agreements."

41 It is envisaged that if the terms of the Proposed Notice are approved by the Court, then, with the agreement of the Applicants, the terms of the existing costs agreement between each Applicant and their solicitor will be amended. In the case of Banton Group, the existing costs agreement between Banton Group and R&B Investments ("the Banton Costs Agreement") will be amended by an "Addendum" which was in evidence.

42 The Banton Costs Agreement recorded that that agreement, together with Banton Group's "General Terms of Business", set out the terms of its offer to provide legal services to R&B Investments and constituted its "costs agreement and disclosure pursuant to the [LPUL]". Clause 3.1 of the Banton Costs Agreement, under the heading "Funding Agreement", provided that:

"While you are primarily liable to this firm for the costs incurred in the Proceedings, we understand you will sign a funding agreement with [ILP] and are in the process of arranging execution. Pursuant to this retainer and the funding agreement, this firm's invoices will be addressed to you, care of ILP and will be paid by ILP."

In the event ILP did not pay any of the firm's invoices, Banton Group confirmed that it would not enforce any of the costs against R&B Investments.<sup>40</sup> The basis on which its professional fees were charged and calculated on an hourly basis was then set out. Banton Group's General Terms of Business were annexed to the Banton Costs Agreement.

43 The proposed Addendum to the Banton Costs Agreement envisaged it being executed as an agreement between R&B Investments and Banton Group. The Addendum provided for amendments to the Banton Costs Agreement which relevantly provided that, after cl 3 of the Banton Costs Agreement, a new cl 3A be inserted as follows:

**"3A. ALTERNATIVE FUNDING ARRANGEMENTS**

3A.1 You have instructed us to seek Court orders establishing a funding arrangement in substitution for the ILP Funding Agreement described in Section 3 above.

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<sup>40</sup> Banton Costs Agreement, cl 3.2.



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3A.2 Specifically, you have instructed us to:

...

- (c) at an appropriate stage of the proceeding – to the extent permitted by law seek orders that or to the effect that:
  - i. legal costs and disbursements be shared between the [Applicants] and the group members in the Consolidated Proceeding (together and severally **Claimants**) pro rata in proportion to their respective recoveries as a result of the proceeding or otherwise as the Court may direct (**Costs Reimbursement**); and
  - ii. [the Solicitors] be remunerated for [their] risks in funding the legal costs and disbursements (pursuant to the agreement described in this clause 3A) by payment of such percentage of the sum recovered as a result of the Consolidated Proceeding (**Resolution Sum**) as may be approved by the Court (**Solicitors' Common Fund Order** or **Solicitors' CFO**);
- (d) as soon as practicable in the proceeding – seek orders that notice be given to the Claimants of the matters in 3A.2(c)."

44 In the event that the orders described in cl 3A.2(d) were made – being notice of those matters set out in cl 3A.2(c) – then cl 3A.3 provided that Banton Group would finance the Consolidated Proceeding (including security for costs and payment of any adverse costs orders against R&B Investments) as required by the Consolidation Agreement; Banton Group would indemnify R&B Investments against any liability in respect of legal costs and disbursements, security for costs or adverse costs in or in connection with the Consolidated Proceeding; and in the event that a Resolution Sum was obtained in the Consolidated Proceeding or otherwise in connection with the claims that are the subject of the Consolidated Proceeding (defined as "Claims"), Banton Group would seek the "Costs Reimbursement" and the "Solicitors' CFO". "Resolution Sum" was defined<sup>41</sup> to mean "any amount or amounts, or the value of goods or services, to which [R&B Investments] or a group member becomes entitled in connection with or satisfaction or part satisfaction of the Claims, including such amount/s or value: (i) as a result of a settlement, judgment or arbitration; and (ii) provided by

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41 Addendum to Banton Costs Agreement, cl 3A.3(d).

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a respondent in the Consolidated Proceeding or any other person, including a person against whom any respondent claims any indemnity, apportionment or contribution".

45 Clause 3A.4 of the Addendum recorded that, "[f]or the avoidance of doubt, by entering into this agreement" R&B Investments (a) agrees that Banton Group are to seek orders as described in cl 3A; (b) does not agree to any particular remuneration, or form of remuneration, to be paid to Banton Group from the Resolution Sum; and (c) agrees that the form and value of remuneration to be provided to Banton Group will be determined by, and take effect pursuant only to, any order for Costs Reimbursement or Solicitors' CFO.

46 Three further matters about these arrangements should be noted. First, Shine Lawyers intended to enter into an updated costs agreement with Mr Furniss to substantially the same effect as the Addendum to the Banton Costs Agreement. Second, the evidence before the Full Court of the Federal Court was to the effect that neither of the Solicitors was or is willing to conduct the Consolidated Proceeding on a "no win, no fee" basis. The stated basis for that view was the "significant risks involved with outlaying legal costs, and taking responsibility for any adverse costs and security for costs (weighed against the likely uplift available on those fees)". Third, the evidence before the Full Court was also to the effect that neither of the Solicitors was willing to conduct the Consolidated Proceeding on an ongoing basis without the Federal Court determining, at an early stage, whether the Court had power to make a Solicitors' CFO.

47 Lastly, it must be emphasised that the phrase "Solicitors' CFO", as used in the Proposed Notice, the proposed agreements and the balance of this judgment, refers to an order authorising a payment to the solicitors for the applicants conducting the proceedings out of a settlement or judgment sum calculated by reference to a "percentage of the sum recovered" or the value of any property that may be recovered. It is not a reference to an order authorising a payment out of a settlement or judgment sum to the solicitors acting for a representative party representing their costs and disbursements paid by reference to a scale or hourly rates.

### **Reserved question and the appeals**

48 That was the background to the Applicants filing the interlocutory application in the Federal Court seeking the Court's approval to distribute the Proposed Notice to group members pursuant to ss 33X and 33Y of the FCA Act. In short, if the Proposed Notice was approved, the Solicitors would seek amendment of their costs agreements to include terms consistent with cll 3A.2,

3A.3 and 3A.4 of the Addendum, including the Solicitors' right to recover the Costs Reimbursement and the Solicitors' CFO.

49 The interlocutory application came before Lee J, who made an order that the following question be reserved before the Full Court of the Federal Court pursuant to s 25(6) of the FCA Act:<sup>42</sup>

"Is it a licit exercise of power, pursuant to statutory powers conferred within Pt IVA of the [FCA Act], or otherwise, for the Court, upon the settlement or judgment of a representative proceeding, to make an order (being a 'common fund order', as that term is defined in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183; (2020) 281 FCR 501 at [19], [22]-[30]) which would provide for the distribution of funds or other property to a solicitor otherwise than as payment for costs and disbursements incurred in relation to the conduct of the proceeding?"

50 The Full Court answered the amended reserved question "Yes". In this Court, Mr Kain, Mr Shand and EY were granted special leave to appeal to challenge that answer. Their appeals were heard together. The Association of Litigation Funders of Australia was given leave to intervene on the hearing of the appeals.

51 During the course of the hearing of the appeals, a number of difficulties emerged with the reserved question.

52 First, the question posed was expressed as a question about the power of the Federal Court, upon the settlement of or judgment in a representative proceeding, to make an order "which would provide for the distribution of funds ... to a solicitor otherwise than as payment for costs and disbursements incurred in relation to the conduct of the proceeding". That last phrase did not squarely identify that the real issue was whether the order that the Solicitors proposed that the Federal Court should make fell within the prohibition against solicitors charging contingency fees contrary to s 183 of the LPUL.

53 Second, the question assumed that the payment which would be authorised would be "otherwise than" as payment for costs and disbursements incurred in

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42 *R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Ltd (Administrators Appointed) (In liq) (Reserved Question)* [2023] FCA 1499. The Full Court of the Federal Court excised from the reserved question the underlined words: *R&B Investments Pty Ltd v Blue Sky Alternative Investments Ltd (In liq) (Reserved Question)* (2024) 304 FCR 395 at 397-398 [4]-[6].

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relation to the Solicitors' conduct of the Consolidated Proceeding when, in fact, the proposed payment would be a reward for the Solicitors amending the costs agreements and then continuing to prosecute the Consolidated Proceeding to the point of recovery on the terms set out in the amended costs agreements. The consideration for the Solicitors' agreement to continue to prosecute the Consolidated Proceeding to a successful outcome would be more than whatever sum was given the badge "costs and disbursements"; it would be all of the stipulations in the amended costs agreements. As explained later in these reasons, no sum that would be paid under the amended costs agreements would be "otherwise than as payment *for* costs and disbursements incurred in relation to the conduct of the proceeding" (emphasis added) even if it were expressed in the amended costs agreements as remuneration for assuming the risk of funding the legal costs and disbursements. All of the amounts for which the amended costs agreements would provide would be a reward for, or, at the very least, in relation to, the performance of the Solicitors' legal services. That is why the supposed distinction drawn in the reserved question between "costs and disbursements" and amounts "otherwise than as payment for costs and disbursements incurred in relation to the conduct of the proceeding" is illusory.

54           There is then a further difficulty about the reserved question which should be identified but is not determinative here. Questions about the ambit of a generally expressed discretionary power (here, a power to make such order as is just under s 33V(2) or s 33Z(1)(g) of the FCA Act) will often overlap with questions about what factors may affect the exercise of the discretion. The bounds of a discretionary power are not always sharply defined. But equally there are cases, of which this is one, where some exercises of the power fall outside the ambit of permissible discretion because the proposed exercise of the power is unlawful.

55           Finally, the specific form of order sought was not identified in the question. None of the identified passages in *Davaria*<sup>43</sup> referred to in the question defined the term "common fund order" (or "CFO") and, during the hearing, the parties could not precisely identify what was meant by that term or other terms – such as a "settlement CFO", a "judgment CFO" or a "funding equalisation order" (or "FEO") – that were used in argument in this Court as well as in earlier cases. At the request of the Court, after the hearing the parties filed a joint note which

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43   (2020) 281 FCR 501 at 506 [19], 506-509 [22]-[30].

provided a conceptual description of a CFO and an FEO, as well as examples of each form of order.<sup>44</sup>

56 A CFO was conceptually described as:

"an order which requires all group members (including those who have not entered into a funding agreement) to contribute equally to a payment to the funder in respect of the funder's commission. It is generally made at the same time as orders dealing with other expenses incurred in the conduct of a class action, the most significant usually being legal costs. The funding commission, calculated as a percentage of the settlement or judgment sum, to be paid to the litigation funder includes a premium for litigation risk."

Specific examples of settlement CFOs – a form of CFO made at settlement – were provided.<sup>45</sup> Those orders either authorised the payment of part of the total settlement sum to a funder<sup>46</sup> or authorised a scheme administrator to deduct a proportion of the amount otherwise payable to a particular group member and pay it to the funder.<sup>47</sup> Contrary to the above description of a CFO, neither order had the *legal effect* of "requir[ing]" group members to "contribute" to a payment. On their face each order was "with respect to the distribution of any money paid under a settlement".<sup>48</sup> The parties were unable to locate an example of a judgment CFO – a CFO made at judgment – with the parties noting their understanding that a judgment CFO has never been made.

57 A funding equalisation order or FEO was conceptually described as "an order that reduces unfunded group members' awards so as to spread the fee or commission payable to the litigation funder by funded group members across all group members". In *Elliott-Card v McDonald's Australia Ltd*, Beach J explained his Honour's conception of an FEO as an order that could be made by either of two

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44 Some of the examples provided of CFOs were inapposite because they were "commencement CFOs", an issue addressed at [66]-[67] below.

45 *Caason Investments Pty Ltd v Cao [No 2]* [2018] FCA 527, Order 12 and *Uren v RMBL Investments Ltd [No 2]* [2020] FCA 647 at [59], Order 8(a)(ii).

46 *Uren* [2020] FCA 647 at [59], Order 8(a)(ii).

47 *Caason Investments* [2018] FCA 527, Order 12.

48 FCA Act, s 33V(2).

methods he referred to as "FEO method 1" and "FEO method 2".<sup>49</sup> In this Court, the parties agreed that although both methods resulted in both funded and unfunded group members having amounts deducted from their recoveries for the payment of the funding commission, there were distinctions between the methods. Two were identified. The first is the starting point. In FEO method 1, the court first calculates the notional amount that unfunded group members would have paid in commission to the funder and then distributes those notional amounts across the whole class so that the net outcome for both the cohort of funded group members and the cohort of unfunded group members was the same.<sup>50</sup> In FEO method 2, the court starts with the contracted funding commission actually incurred as between funded group members and the funder and distributes that contractual obligation equally amongst funded and unfunded group members after the litigation funder's commission is determined.<sup>51</sup> The second distinction was said to be that, under FEO method 1, there is a prospect that a funder may seek commission on the notional incremental increase attributed to funded group members as part of the funding equalisation formula.<sup>52</sup>

58 In relation to FEO method 2, Order 12 in *Equity Financial Planners Pty Ltd v AMP Financial Planning Pty Ltd* was given as an example.<sup>53</sup> In relation to FEO method 1, the joint note recorded that it was difficult to discern from the authorities whether an order reflected that method but gave two examples where that method *may* have been used because each contained a reduction in the entitlement of unfunded group members which was then spread pro rata across funded and unfunded group members, thus incrementally increasing the return to funded group members who paid the funding commission to the funder.<sup>54</sup> Similar to the settlement CFOs, the legal effect of the orders made in the cases giving effect to FEOs to which this Court was referred was to distribute, or authorise the distribution of, part of the settlement sum otherwise payable to unfunded group

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49 (2023) 301 FCR 1 at 28 [156]-[157].

50 *Elliott-Cardé* (2023) 301 FCR 1 at 28 [156] and the authorities cited.

51 *Elliott-Cardé* (2023) 301 FCR 1 at 28 [157].

52 See, eg, *Elliott-Cardé* (2023) 301 FCR 1 at 28 [156], citing *Blairgowrie Trading Ltd v Allco Finance Group Ltd (In liq) [No 3]* (2017) 343 ALR 476 at 503 [99].

53 [2024] FCA 1036.

54 *Clime Capital Ltd v UGL Pty Ltd* [2020] FCA 66, Order 9 and *Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Ltd* [2021] FCA 475 at [127].

members to funded group members as reimbursement for the amounts paid or contractually owing by the latter to the funder.<sup>55</sup>

59 In these reasons, the conceptual description of a CFO and an FEO provided by the parties has been adopted. However, as has been explained, those conceptual descriptions are principally addressed to the manner of calculation of the various component payments to be made as part of any settlement of or judgment given in a representative proceeding rather than their legal effect. The reference to a "settlement" or "judgment" CFO or an FEO in the balance of these reasons also incorporates the legal effect of orders to give effect to those calculations by way of distributing part of the settlement (or judgment) sum to either the funder or funded group members to reflect those calculations. The same applies to a Solicitors' CFO. These reasons do not address whether, to effect a settlement or judgment, orders can be made imposing liabilities on group members.

#### **Part IVA of the FCA Act**

60 Part IVA of the FCA Act has previously been considered by this Court.<sup>56</sup> The answer to the real issues underlying the reserved question in these appeals concerns the proper construction of ss 33V(2) and 33Z(1)(g) in Pt IVA. Each provision is concerned with a representative proceeding coming to an end – s 33V by settlement; s 33Z by judgment.

61 Section 33V is headed "Settlement and discontinuance – representative proceeding". Sub-section (1) provides that a representative proceeding may not be settled or discontinued without the approval of the Court. Sub-section (2) provides:

"If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court."

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55 *Clime Capital* [2020] FCA 66, Order 9(c); *Wetdal* [2021] FCA 475 at [127]; *Equity Financial Planners* [2024] FCA 1036, Order 12.

56 See, eg, *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255; *BMW Australia Ltd v Brewster* (2019) 269 CLR 574; *BHP Group Ltd v Impiombato* (2022) 276 CLR 611; *Karpik v Carnival Plc* (2023) 98 ALJR 45; 415 ALR 491. See also *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1; *Timbercorp Finance Pty Ltd (In liq) v Collins* (2016) 259 CLR 212; *Wigmans v AMP Ltd* (2021) 270 CLR 623; *Lendlease Corporation Ltd v Pallas* (2025) 99 ALJR 834.

Section 33Z, headed "Judgment – powers of the Court", provides:

- "(1) The Court may, in determining a matter in a representative proceeding, do any one or more of the following:
- (a) determine an issue of law;
  - (b) determine an issue of fact;
  - (c) make a declaration of liability;
  - (d) grant any equitable relief;
  - (e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies;
  - (f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members;
  - (g) *make such other order as the Court thinks just.*
- (2) In making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled.
- (3) Subject to section 33V, the Court is not to make an award of damages under paragraph (1)(f) unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.
- (4) Where the Court has made an order for the award of damages, the Court may give such directions (if any) as it thinks just in relation to:
- (a) the manner in which a group member is to establish his or her entitlement to share in the damages; and
  - (b) the manner in which any dispute regarding the entitlement of a group member to share in the damages is to be determined." (emphasis added)



63 As will be explained, where the solicitor acting for the representative party or a group member is subject to the LPUL, then the Federal Court may not make an order under s 33V(2) or s 33Z(1)(g) of the FCA Act under which an amount to be paid to or for the benefit of the solicitor is calculated by reference to the amount that might be paid or is to be paid as an award or under a settlement or the value of any property that may be recovered in the proceedings, including in the terms of the Solicitors' CFO.

64 The Federal Court, however, does have power under ss 33V(2) and 33Z(1)(g) of the FCA Act to make a settlement CFO or a judgment CFO in favour of a litigation funder, or an FEO. It is appropriate to address the power of the Federal Court to make those orders before turning to the Solicitors' CFO that is the subject of these appeals.

### **Notice of contention and *Brewster***

65 The Applicants filed a notice of contention by which they contended that the decision of the Full Court the subject of these appeals erroneously failed to decide that the Federal Court had power to make an order or orders relating to the remuneration of a litigation funder to be borne pro rata by the group members from a common fund of the proceeds to be recovered from the litigation, including at an early stage in the proceedings,<sup>57</sup> and that this Court's decision in *BMW Australia Ltd v Brewster*<sup>58</sup> should be reopened and overturned to the extent it holds to the contrary.

66 *Brewster* did not address, let alone resolve, the power of the Federal Court under s 33V(2) or s 33Z(1)(g) of the FCA Act to make a settlement CFO or a judgment CFO in favour of a litigation funder, or a Solicitors' CFO.<sup>59</sup> In *Brewster*, this Court considered s 33ZF(1) of the FCA Act (and its equivalent in s 183 of the *Civil Procedure Act 2005* (NSW)) and a majority held that those provisions did not empower the Federal Court (or the Supreme Court of New South Wales) to make an order early in representative proceedings that allowed for part of a

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57 A further ground of the notice of contention argued this power extended to a power to make a Solicitors' CFO. The Applicants abandoned the other grounds in their notice of contention.

58 (2019) 269 CLR 574.

59 See *Davaria* (2020) 281 FCR 501 at 511-512 [42]; *Elliott-Cardé* (2023) 301 FCR 1 at 81-82 [499]-[502]; *Galactic Seven Eleven Litigation Holdings LLC v Davaria* (2024) 302 FCR 493 at 509 [58].

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litigation funder's remuneration to be a proportion of moneys recovered in a settlement or judgment, with all group members (both funded and unfunded) bearing a proportionate share of liability.<sup>60</sup> That was the ratio in *Brewster*.

67 The form of order sought in *Brewster* to make payments from moneys recovered in a settlement or judgment – a "commencement CFO" or an "interim CFO" – was distinct. Such orders are made early in the representative proceeding, in interim form, and are usually made "subject to further order"<sup>61</sup> and in some cases purport to impose substantive future liabilities on the representative party and group members.<sup>62</sup> The judgments in *Brewster* described the orders as being made at an early stage of proceedings and reasoned on that basis.<sup>63</sup> This is reinforced by the fact that the majority reasoned that s 33ZF(1) (which relevantly provides that "the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding") was concerned with justice in the proceeding, not whether a proceeding could proceed or be pursued at all.<sup>64</sup> Further, the plurality considered it a "speculative exercise" to fix the litigation funder's rate of remuneration at the commencement of the proceeding absent criteria to evaluate its appropriateness or necessity.<sup>65</sup> In any event, the order sought in *Brewster* was directed to payments to litigation funders, not solicitors.<sup>66</sup>

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60 (2019) 269 CLR 574 at 588 [1], 589 [3], 624 [125], 628 [135].

61 See, eg, *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 at 195 [9]-[10].

62 *Money Max* (2016) 245 FCR 191 at 195 [9], Order 1.

63 (2019) 269 CLR 574 at 588 [1], 628 [135]; see also 617 [104], 640 [178]; cf Nettle J. See also *Lendlease* (2025) 99 ALJR 834 at 843-844 [23].

64 *Brewster* (2019) 269 CLR 574 at 589 [3], 600 [49]-[50], 624 [125], 631-632 [146]-[148]. See also *Lendlease* (2025) 99 ALJR 834 at 854 [66].

65 *Brewster* (2019) 269 CLR 574 at 604-605 [66]-[67]. See also *Lendlease* (2025) 99 ALJR 834 at 844 [23].

66 (2019) 269 CLR 574 at 588 [1], 628 [135]; see also 617 [104], 640 [178]. See also *Lendlease* (2025) 99 ALJR 834 at 843 [23], 854 [66].

68 There is no basis to reopen *Brewster*.<sup>67</sup> *Brewster* should not be reopened merely to permit re-agitation of arguments that did not prevail in favour of a "commencement CFO".

### Sections 33V(2) and 33Z(1)(g) in Pt IVA of the FCA Act

69 Having established that *Brewster* is not determinative of the issues in these appeals, the starting point is the text of each of s 33V(2) and s 33Z(1)(g), which obliges the Federal Court to decide what orders are "just" in a particular context – s 33V(2), where the proceeding ends by settlement; s 33Z(1)(g), where it ends by judgment. Both are powers of considerable breadth and wide discretion. Moreover, as both provisions confer jurisdiction to make orders of a particular kind, it is not appropriate to read either provision "by making implications or imposing limitations which are not found in the express words".<sup>68</sup>

#### *Section 33V – settlement*

70 Section 33V(1) requires that a representative proceeding not be settled or discontinued without the approval of the Court. A negotiated settlement will often include a distribution of part of a fund to a third party; it is a matter for the Court whether that is approved. Section 33V(2) then provides that, if the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court. The power in s 33V(2) is to make final orders in the Court's approval jurisdiction. It is not a "gap-filling" power.<sup>69</sup> The Court's role is to evaluate the proposed settlement terms at the time of settlement based on the circumstances that pertain at that time.<sup>70</sup>

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67 cf *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 629-630 [162]; *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at 150 [17], quoting *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352 [70]; *MJZP v Director-General of Security* [2025] HCA 26 at [16].

68 *Elliott-Cardé* (2023) 301 FCR 1 at 78 [483], quoting *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421. See also *Wong* (1999) 199 CLR 255 at 260-261 [11].

69 cf *Brewster* (2019) 269 CLR 574 at 606 [70], 632 [147].

70 *Elliott-Cardé* (2023) 301 FCR 1 at 79 [487].

71 Is there a limit on the power in s 33V(2) that prevents a settlement CFO? Nothing on the face of the terms of s 33V(2) implies anything about the identity of the recipient of any distribution, beyond that such orders will not be made unless they are "just".<sup>71</sup> Mr Kain, however, submitted that s 33V(2) must be limited to payment to the applicant and group members, or those to whom a pre-existing legal obligation is owed, on the basis that the settlement fund relates to the settling of the claims between the parties. That argument must be rejected. There is no reason to read "distribution" or the text of s 33V(2) as limited to the parties to the litigation.

72 A settlement agreement may sometimes include terms that concern third parties, particularly where those third parties helped to facilitate the proceeding or the outcome of the proceeding. One example, as counsel for Mr Shand properly conceded would be within the scope of s 33V(2), is that it is sometimes necessary in securing the distribution of funds to provide for payment to a third party in order to achieve that distribution, such as the costs of the actual distribution of the fund itself through the use of an administrator. It is difficult to identify any meaningful distinction between this payment and a payment to a litigation funder who paid the costs and disbursements to facilitate the proceeding and to secure the settlement fund.

73 Further, unlike a commencement or interim CFO, an order distributing a proportion of the settlement sum to the litigation funder does not create new relationships between unfunded group members and the litigation funder. It is not proposed by reference to agreed funding terms between funded group members and the litigation funder, but instead on the basis that it is a fair and reasonable term of the settlement.<sup>72</sup>

74 Finally, other powers in Pt IVA that use the term "distribution" name the recipient of that distribution, including, for example, ss 33M(b), 33Z(2) and 33ZA. This is a further basis against construing s 33V(2) to limit the class of particular recipients of any distribution where none is identified on its face. For those reasons, an order authorising the deduction of an amount from a settlement sum as payment to a litigation funder may answer the description of an order "with respect to the distribution of any money" in s 33V(2) and that may include both a CFO and an FEO at settlement.

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71 *Elliott-Cardé* (2023) 301 FCR 1 at 20 [99]; *Galactic Seven Eleven Litigation Holdings LLC v Davaria* (2024) 302 FCR 493 at 509 [57].

72 *Elliott-Cardé* (2023) 301 FCR 1 at 80 [492]; see also 25-26 [134]-[138].

*Section 33Z – judgment*

75           Section 33Z(1) enumerates a list of actions that the Court may take in determining a matter in a representative proceeding. Paragraphs (a) to (f) list specific powers of the Court at judgment. Paragraph (g) provides that the Court may "make such other order as the Court thinks just".

76           Is there a limit on the power in s 33Z(1)(g) that prevents the Court from making a judgment CFO? Although the parties could not provide an example of a judgment CFO, there was no identified basis for concluding that such an order could not be made. First, Mr Kain, Mr Shand and EY submitted that s 33Z(1)(g) should be interpreted consistently with paras (a) to (f) of s 33Z(1), which are limited to orders affecting the parties or group members. That submission must be rejected. A judgment CFO by its nature would be an order affecting the parties to the litigation, as submitted by the Applicants, by "sharing both the burdens and benefits of the litigation ... and ... achieving justice between" the parties. The fact that a judgment CFO might *also* affect a third party is not determinative.

77           Second, Mr Kain, Mr Shand and EY submitted that the power in s 33Z(1)(g) is limited by the term "matter", which should be read as a source of power to make orders necessary to resolve the dispute between the parties and limited to issues within the proceeding. Once again, this is an overly restrictive reading of s 33Z(1)(g). The "matter" may well include the fair distribution of the fund created by the award of damages on judgment, having regard to all people who may have claims on that fund.

78           Third, Mr Shand submitted that, as s 33Z(2) is limited to payment or distribution of money to group members, the general power in s 33Z(1)(g) should not be construed as an exception to s 33Z(2). That submission misconstrues s 33Z(2). That sub-section does not exhaust the Court's powers on the distribution of a judgment fund. It does not operate as a constraint on s 33Z(1)(g).

79           Fourth, Mr Shand submitted that the construction adopted would make s 33ZJ redundant. Section 33ZJ expressly deals with the possibility of adjustment to group members' entitlement to damages to account for legal costs. It deals with a specific situation – costs equalisation between group members. On its face, s 33ZJ does not address, let alone exhaust, the Court's powers on the distribution of a judgment fund.

Gordon J  
Steward J  
Gleeson J  
Beech-Jones J

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### **No power to make a Solicitors' CFO**

80 That ss 33V(2) and 33Z(1)(g) allow for the making of a settlement CFO, a judgment CFO and an FEO does not answer whether they permit the making of a Solicitors' CFO. As will be explained, neither provision empowers the Federal Court to make an order for payment from the settlement or judgment fund which is prohibited by law or gives effect to an agreement or understanding that is otherwise unlawful. An unlawful payment cannot be a "just" payment. That last statement needs explanation.

81 "State and Territory schemes of regulation of the legal profession form part of the context in which federal jurisdiction is exercised, and have an impact upon the practical circumstances in which the rule of law is maintained."<sup>73</sup> For that reason, the Federal Court exercises power in federal jurisdiction against the background of the scheme of regulation of the legal profession in the State or Territory in which the solicitors in the proceeding are practising.<sup>74</sup> In New South Wales, that includes the LPUL and the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) ("the Uniform Rules"), which regulate the legal profession in New South Wales. As will be seen, a Solicitors' CFO is prohibited by s 183 of the LPUL and its recovery is prohibited by s 185(4) of the LPUL.

82 It is necessary and appropriate to consider the components of the scheme.

#### *LPUL*

83 The LPUL seeks to "promote the administration of justice and an efficient and effective Australian legal profession" by, among other things, "providing and promoting interjurisdictional consistency in the law applying to the Australian legal profession"; "ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services"; "enhancing the protection of clients of law practices and the protection of the public generally"; "empowering clients of law practices to make informed choices about the services they access and the costs involved"; and "promoting regulation of the legal profession that is efficient, effective, targeted and proportionate".<sup>75</sup>

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<sup>73</sup> *APLA* (2005) 224 CLR 322 at 352 [32].

<sup>74</sup> *APLA* (2005) 224 CLR 322 at 352 [32]. See also *P v P* (1994) 181 CLR 583 at 602.

<sup>75</sup> LPUL, s 3(a)-(e).

84 Chapter 4 of the LPUL is headed "Business practice and professional conduct". The objectives of Ch 4 are to "ensure appropriate safeguards are in place for maintaining the integrity of legal services" and to "apply those safeguards regardless of the type of business structure used for the delivery of legal services".<sup>76</sup> "Legal services" means "work done, or business transacted, in the ordinary course of legal practice".<sup>77</sup>

85 Part 4.3 of Ch 4 addresses legal costs – relevantly, "amounts that a person has been or may be charged by, or is or may become liable to pay to, a law practice for the provision of legal services".<sup>78</sup> The objectives of Pt 4.3 include ensuring "that clients of law practices are able to make informed choices about their legal options and the costs associated with pursuing those options" and "to provide that law practices must not charge more than fair and reasonable amounts for legal costs".<sup>79</sup> Consistent with those objectives, a law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances and that, in particular, are (a) proportionately and reasonably incurred and (b) proportionate and reasonable in amount.<sup>80</sup> In considering whether legal costs are fair and reasonable, regard must be had to whether the legal costs conform to any applicable requirements of Pt 4.3 and the Uniform Rules.<sup>81</sup>

86 Division 4 of Pt 4.3 deals with costs agreements. A client of a law practice has the right to require and to have a negotiated costs agreement with the law practice.<sup>82</sup> A costs agreement must be written or evidenced in writing,<sup>83</sup> although the phrase "costs agreement" itself is not defined. A costs agreement may provide for what is commonly described as a "no win, no fee" arrangement where the payment of some or all of the legal costs is conditional on the successful

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76 LPUL, s 126.

77 LPUL, s 6(1) definition of "legal services".

78 LPUL, s 6(1) definition of "legal costs".

79 LPUL, s 169(a) and (b).

80 LPUL, s 172(1).

81 LPUL, s 172(3).

82 LPUL, s 179.

83 LPUL, s 180(2).

outcome of the matter to which those costs relate ("a conditional costs agreement").<sup>84</sup>

87 A conditional costs agreement is subject to specific limitations and exceptions.<sup>85</sup> So, for example, s 182 provides that a conditional costs agreement may provide for an uplift fee,<sup>86</sup> subject to the following specific constraints:

- "(2) If a conditional costs agreement relates to a litigious matter –
  - (a) the agreement must *not* provide for the payment of an uplift fee unless the law practice has a reasonable belief that a successful outcome of the matter is reasonably likely; and
  - (b) the uplift fee must *not* exceed 25% of the legal costs (excluding disbursements) otherwise payable.
- (3) A conditional costs agreement that includes an uplift fee –
  - (a) must identify the basis on which the uplift fee is to be calculated; and
  - (b) must include an estimate of the uplift fee or, if that is not reasonably practical –
    - (i) a range of estimates for the uplift fee; and
    - (ii) an explanation of the major variables that may affect the calculation of the uplift fee.
- (4) A law practice must *not* enter into a costs agreement in contravention of this section or of the Uniform Rules relating to uplift fees.

Civil penalty: 100 penalty units." (emphasis added)

A law practice that has entered into a costs agreement in contravention of s 182 is not entitled to recover the whole or any part of the uplift fee and must repay

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84 LPUL, s 181(1).

85 LPUL, ss 181 and 182.

86 LPUL, s 182(1).



the amount received in respect of the uplift fee to the person from whom it was received.<sup>87</sup>

88 By contrast, s 183 expressly prohibits "contingency fees":

"(1) A law practice must not enter into a costs agreement *under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.*

Civil penalty: 100 penalty units.

(2) Subsection (1) does not apply to the extent that the costs agreement adopts an applicable fixed costs legislative provision.

(3) A contravention of subsection (1) by a law practice is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention." (emphasis added)

A law practice that has entered into a costs agreement in contravention of s 183 is not entitled to recover any amount in respect of the provision of legal services in the matter to which the costs agreement related and must repay any amount received in respect of those services to the person from whom it was received.<sup>88</sup>

89 A costs agreement that contravenes, or is entered into in contravention of, any provision of Div 4 of Pt 4.3 is void.<sup>89</sup> In addition, a law practice is not entitled to recover any amount in excess of the amount that the law practice would have been entitled to recover if the costs agreement had not been void and must repay any excess amount received.<sup>90</sup>

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87 LPUL, s 185(3).

88 LPUL, s 185(4).

89 LPUL, s 185(1).

90 LPUL, s 185(2).

### *Uniform Rules*

- 90 Part 4.3 of the LPUL expressly refers to and incorporates the Uniform Rules in considering whether legal costs are fair and reasonable<sup>91</sup> and in relation to uplift fees.<sup>92</sup> The Uniform Rules apply as the Legal Profession Conduct Rules under the LPUL to solicitors and Australian-registered foreign lawyers acting in the manner of a solicitor.<sup>93</sup> In considering whether a solicitor has engaged in unsatisfactory professional conduct or professional misconduct, the Uniform Rules apply in addition to the common law.<sup>94</sup> A breach of the Uniform Rules is capable of constituting unsatisfactory professional conduct or professional misconduct, and may give rise to disciplinary action by the relevant regulatory authority.<sup>95</sup>

### *Other States and Territories*

- 91 The charging by a law practice of a contingency fee is prohibited in other States and Territories.<sup>96</sup> The sole exception to that prohibition is that the *Supreme Court Act 1986* (Vic) empowers the Supreme Court of Victoria to make a GCO in a group proceeding commenced under Pt 4A of that Act.<sup>97</sup> A "GCO" is "an order that the legal costs payable to the law practice representing the plaintiff and group members in a group proceeding be calculated as a specified percentage of the amount of any award or settlement recovered in the proceeding and that liability for payment of those legal costs be shared amongst the plaintiff

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91 LPUL, s 172(3).

92 LPUL, s 182(4).

93 Uniform Rules, Pt 2, r 1.1.

94 Uniform Rules, Pt 2, r 2.2.

95 Uniform Rules, Pt 2, r 2.3. See also rr 3 to 6 of Pt 2, prescribing the fundamental duties of solicitors, and r 12.2 of Pt 2, prohibiting a solicitor seeking any benefit in excess of fair and reasonable remuneration for legal services.

96 *Bogan* (2025) 99 ALJR 619 at 623 [1] fn 1, citing, relevantly, *Legal Profession Uniform Law* (Vic), s 183; *Legal Practitioners Act 1981* (SA), Sch 3, cl 27; *Legal Profession Act 2007* (Qld), s 325; *Legal Profession Uniform Law* (WA), s 183; *Legal Profession Act 2007* (Tas), s 309; *Legal Profession Act 2006* (NT), s 320; *Legal Profession Act 2006* (ACT), s 285.

97 *Supreme Court Act 1986* (Vic), s 33ZDA. See *Bogan* (2025) 99 ALJR 619 at 623 [1].

and group members".<sup>98</sup> It should be observed that a GCO, once ordered, is the sole mechanism for the recovery of all legal costs, whereas a Solicitors' CFO is ordered in addition to a law practice's usual recovery of costs and disbursements.

92 Those statutory prohibitions, their consistency and the existence of the power of the Supreme Court of Victoria to make a GCO were addressed by a federal Parliamentary Joint Committee on Corporations and Financial Services that published a report in December 2020 entitled "Litigation funding and the regulation of the class action industry".<sup>99</sup> The Committee considered that "the public interest outcomes potentially achieved with the availability of contingency fee billing in class actions [were] not ... outweighed by the potential for their exploitation for the benefit of lawyers' profits, even with the existence of safeguards"<sup>100</sup> and concluded that "[a] measured and steady approach to the use of contingency fees in class actions is essential".<sup>101</sup> The Committee recommended that the Commonwealth Government work with State and Territory governments to achieve consistent class action regimes across jurisdictions.<sup>102</sup> For present purposes, it is sufficient to note that, except for the power to make a GCO in Victoria, there has been no change to the statutory prohibitions against contingency fees.

*Civil Liability Act 2002 (NSW)*

93 In New South Wales, the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) ("the Abolition Act") abolished the crimes, and the torts,

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98 *Bogan* (2025) 99 ALJR 619 at 623 [1].

99 Australia, Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry* (2020).

100 Australia, Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry* (2020) at 248 [14.173]; see also 248-251 [14.174]-[14.192].

101 Australia, Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry* (2020) at xix.

102 Australia, Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry* (2020) at xxxi, 360 [18.37] (Recommendation 31).

of maintenance and champerty.<sup>103</sup> Section 6 of the Abolition Act, however, preserved any rule of law in which a contract is to be treated as contrary to public policy or as otherwise illegal.<sup>104</sup> As Gummow, Hayne and Crennan JJ observed in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*,<sup>105</sup> by abolishing those crimes and those torts, any wider rule of public policy (that is, wider than the particular rules preserved by s 6 of the Abolition Act) lost any footing.<sup>106</sup>

94        Given the statutory prohibition in New South Wales against contingency fees, it is otherwise unnecessary to identify the nature and extent of the particular rules which were preserved by s 6, the extent to which questions of maintenance and champerty remain legally relevant, or how and why considerations of public policy and illegality can still arise in connection with contracts providing for maintenance or champerty.<sup>107</sup>

95        It is sufficient to record that, consistent with *Fostif* and *Clyne v NSW Bar Association*,<sup>108</sup> in New South Wales, which has abolished the torts of maintenance and champerty but has an exception for agreements which are contrary to public policy, there may be no overarching rule which prohibits all champertous agreements but champertous agreements that are otherwise contrary to a rule of law, such as the prohibition against contingency fees in s 183 of the LPUL, may also be void under the common law.

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**103** *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 425 [66], 433 [86]. See also *Wrongs Act 1958* (Vic), s 32; *Criminal Law Consolidation Act 1935* (SA), Sch 11, cl 1(3) and 3(2)(b)-(c); *Civil Procedure (Representative Proceedings) Act 2022* (WA), s 36; *Civil Liability Act 2002* (Tas), s 28E(ba)-(bb); *Civil Law (Wrongs) Act 2002* (ACT), s 221.

**104** *Fostif* (2006) 229 CLR 386 at 425 [66], 433 [86]. See fn 103 above but cf *Civil Liability Act 2002* (Tas), s 28E; *Civil Law (Wrongs) Act 2002* (ACT), s 221.

**105** (2006) 229 CLR 386 at 433 [86].

**106** Sections 4 and 6 of the Abolition Act were re-enacted with minor modifications by cl 2 of Sch 2 to the *Civil Liability Act 2002* (NSW).

**107** See *Fostif* (2006) 229 CLR 386 at 425 [67].

**108** (1960) 104 CLR 186 at 203.

*No power to make a Solicitors' CFO*

96 If made, the Solicitors' CFO provides for the Solicitors to be remunerated "by payment of such percentage of the Resolution Sum as may be approved by the Court", that being an amount payable which is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered. If the Solicitors' CFO were made, the Court would be giving effect to an agreement that was entered into contrary to s 183 of the LPUL and would be enabling the Solicitors to recover amounts which they are disentitled from recovering under s 185 of the LPUL. Such an order cannot be within the power of the Federal Court under s 33V(2) or s 33Z(1)(g). It cannot be "just" to make an order that gives effect to an agreement that was unlawfully entered into and to enable a solicitor to recover amounts to which they are not entitled. Put another way, the Court cannot authorise what the LPUL forbids.

97 The prohibition in s 183 of the LPUL is a protective measure. It provides that a law practice must not enter into a costs agreement "under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates".

98 Here, there was the Banton Costs Agreement, which included a funding agreement<sup>109</sup> which the Solicitors, with the agreement of the Applicants, sought to remove and replace with the Costs Reimbursement and the Solicitors' CFO. The Solicitors were instructed by the Applicants to seek orders in the Federal Court seeking the Costs Reimbursement and the Solicitors' CFO.<sup>110</sup> It was the Applicants who asked the Court to approve the Proposed Notice which contained the proposed amendments to the Banton Costs Agreement. Once approved by the Court, the costs agreements between the Solicitors and their clients would be amended to reflect the Court's orders. That amendment would replace the litigation funder with the result that the Solicitors would finance the Consolidated Proceeding. Further, if orders were not made in the terms sought, the Applicants agreed to seek orders for the transfer of the Consolidated Proceeding to the Supreme Court of Victoria to obtain a GCO (being the only statutory exception to the prohibition on contingency fees) or, alternatively, to seek commercial litigation funding.

99 What was proposed and what was sought to be achieved, if approved by the Court, was that the amended costs agreements would provide for the payment

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**109** See [42] above.

**110** See [43] above.

Gordon J  
Steward J  
Gleeson J  
Beech-Jones J

36.

to the Solicitors of two amounts: the Costs Reimbursement and the Solicitors' CFO. The amended costs agreements would contain a term "under which the amount payable to the [Solicitors] is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement[s] relate[]", within the meaning of s 183(1) of the LPUL.

100 Those costs agreements would relate to legal costs and, in turn, legal services, as those terms are defined in the LPUL.<sup>111</sup> Taken together, those terms extend to encompass amounts charged for *all* work and *all* business undertaken by the law practice "in the ordinary course of legal practice". In these appeals, the Solicitors were retained by the Applicants to engage in the ordinary course of legal practice of prosecuting the Consolidated Proceeding to the point of recovery. Put in different, but related, terms the Solicitors' CFO was not "otherwise" than as payment for costs and disbursements incurred in relation to the Solicitors' conduct of the Consolidated Proceeding. The Solicitors' CFO was to be a reward for the Solicitors entering into the amended costs agreements and then continuing to prosecute the Consolidated Proceeding to the point of recovery on the terms set out in those agreements. The consideration for the Solicitors' agreement to continue to prosecute the Consolidated Proceeding to a successful outcome was to be more than whatever sum is given the badge "costs and disbursements" or "Costs Reimbursement"; it was all of the stipulations in the amended costs agreements. No sum that would be paid under those agreements was "otherwise than as payment for costs and disbursements incurred in relation to the conduct of the proceeding". All sums that comprise the Solicitors' CFO were to be reward for, or, at the very least, in relation to, the performance of "legal services" (as defined).

101 The Applicants' reference to the provision of "risk services" – including contingent or conditional costs, providing security for costs and indemnifying for adverse costs – in contradistinction to the provision of legal services is artificial. The so-called "risk services" were work and business proposed to be undertaken by the Solicitors in the course of their legal practice. That is why the supposed distinction drawn in the reserved question between legal "costs and disbursements" and amounts "otherwise than as payment for costs and disbursements incurred in relation to the conduct of the proceeding" was illusory.

102 The Applicants' contention that the "risk services" provided by the Solicitors were not captured by the prohibition in s 183 of the LPUL cannot be accepted for another reason. If that contention was correct, then law practices that

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<sup>111</sup> See [84]-[85] above.

charge legal costs and disbursements and then seek an additional fee (being the so-called "risk service") by way of a percentage of the judgment or settlement sum would not be captured by s 183, but law practices that charge legal costs and disbursements *only* by way of a percentage of the judgment or settlement sum would be captured. For s 183 to operate in that manner would prioritise form over substance. Further, conditional costs agreements or "no win, no fee" costs agreements, which are expressly provided for by s 181, apply to costs for the provision of legal services, yet inherently involve what the Applicants contend are "risk services". This strengthens the conclusion that there is no distinction between legal services and the asserted "risk services".

103 Those reasons provide a complete answer to the Applicants' further submission that the amount payable to the solicitors is referable to a court order and not the Banton Costs Agreement, so that there would be no costs agreement "under which" the amount payable to the solicitors was calculated in the proscribed manner. The Solicitors' CFO and the court order are inextricably linked. Put another way, the order sought authorises or gives effect to the proposed Addendum to the Banton Costs Agreement. Neither the specific order sought, nor recourse to the provisions of Pt IVA of the FCA Act, can be used to circumvent the express prohibition on contingency fees in s 183 of the LPUL.

104 That construction of s 183 of the LPUL is reinforced by the fact that the purposes of Pt 4.3 include to protect clients of law practices by ensuring that costs are fair and reasonable. The prohibition in s 183 is one specific aspect of that objective, which is reinforced by the Uniform Rules. Contrary to the Applicants' argument, s 183 is not purely directed to the mischief of "undue influence". Section 183 is also about preventing conflicts and ensuring solicitors act in line with their fiduciary obligations. In sum, to read s 183 as not extending to costs agreements which are entered into, or amended, by application to the Court for orders which, absent the order, would be unlawful would not be consistent with those objectives. The prohibition in s 183 must also be read in the context of the fact that a law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances and that, in considering whether legal costs are fair and reasonable, regard must be had to whether the legal costs conform to any applicable requirements of Pt 4.3 and the Uniform Rules.<sup>112</sup> The sole exception to the prohibition in s 183(1) is expressly provided for in the *Supreme Court Act 1986* (Vic).<sup>113</sup>

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112 See [85] and [90] above.

113 See [91] above.

Gordon J  
Steward J  
Gleeson J  
Beech-Jones J

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## Conclusion and orders

105 For those reasons, the orders in each appeal are:

1. Appeal allowed.
2. Set aside paragraphs 2 and 3 of the Orders of the Full Court of the Federal Court of Australia made on 5 July 2024 and, in their place, order that:
  - (a) the question reserved in paragraph 1 of the Orders of the Full Court made on 5 July 2024 be answered:

"Where the solicitor acting for the representative party or a group member is subject to the *Legal Profession Uniform Law* (NSW), then the Federal Court of Australia may not make an order under s 33V(2) or s 33Z(1)(g) of the *Federal Court of Australia Act 1976* (Cth) that an amount be paid to or for the benefit of the solicitor calculated by reference to the amount that might be or is to be paid under a settlement or an award of damages or the value of any property that may be recovered in the proceedings. The question is otherwise inappropriate to answer."; and
  - (b) the applicants pay the second, ninth and twelfth respondents' costs of and incidental to the hearing of the reserved question.
3. The first and second respondents pay the appellant's and the fourth and fifth respondents' costs of the appeal.



EDELMAN J.

**Litigation funding and alphabet soup: CFOs, FEOs, GCOs, and SCFOs**

106 Since 2006,<sup>114</sup> litigation funding in Australia has been a means by which justice can be sought in some proceedings, often group litigation where justice would otherwise have been unavailable because members of the group could not afford, or could not individually justify, the vindication of their rights. Litigation funding of group litigation requires funders to have a means of remuneration for the costs they bear and the risk they take when funding such litigation. By a combination of legislative innovation and practitioner creativity, modern Australian law has come to recognise a variety of procedures for group litigation to enhance access to justice.

107 One procedure is a **common fund order** ("CFO"), which has a number of typical characteristics<sup>115</sup> but the essence of which is usually that all group members contribute equally to the litigation funder's commission, which is taken as a percentage of the settlement or judgment sum. CFOs have been made as interim orders (after the commencement of a proceeding)<sup>116</sup> or upon settlement.<sup>117</sup> They can also be made upon judgment. They are usually made independently of the orders concerning the party or parties who will bear the costs of the action.

108 A second procedure is a **funding equalisation order** ("FEO"), which is a court order that seeks, by various possible means, to equalise the position between those group members who have entered funding agreements with a litigation funder ("funded group members") and those who have not ("unfunded group members"). Upon the making of an award at settlement or judgment, an FEO reduces the amount of the award payable to unfunded group members so as to spread the litigation funder's commission across all group members.

109 A third procedure is a **group costs order** ("GCO"). In Victoria, the GCO is a legislative innovation that took effect from 1 July 2020 with the introduction of ss 33ZD(2) and 33ZDA of the *Supreme Court Act 1986* (Vic).<sup>118</sup> The latter section

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114 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

115 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 30-32 [20]-[28]; *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at 640 [179].

116 *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd* (2019) 139 ACSR 171 at 174 [15], 175-176 [22].

117 *Caason Investments Pty Ltd v Cao [No 2]* [2018] FCA 527, Order 12; *Uren v RMBL Investments Ltd [No 2]* [2020] FCA 647, Order 8(a)(ii).

118 *Justice Legislation Miscellaneous Amendments Act 2020* (Vic), ss 4, 5.

empowers the Supreme Court of Victoria to make an order that the legal costs payable to a law practice that represents the plaintiff and group members in a group proceeding be calculated as a specified "percentage of the amount of any award or settlement that may be recovered in the proceeding" with the liability for legal costs to be shared among the plaintiff and all group members.<sup>119</sup>

110 A fourth procedure is a **solicitors' common fund order** ("SCFO"), which is a CFO made in favour of a solicitor or solicitors who have funded the litigation including by the provision of the legal services. In this sense, an SCFO is just a CFO where the funder is the solicitor providing the legal services. That is how the proposed SCFO in this case was described in the form of a proposed Opt Out Notice which the applicants in this representative proceeding ("the Class Action Applicants", being the first and second respondents to these appeals) seek to have issued by the Federal Court:

"The solicitors for the Applicants are financing these proceedings, by paying lawyers in their employ as well as barristers and other experts, and by taking on the financial risks of conducting the proceeding, including by indemnifying the Applicants against adverse costs, and furnishing any security for costs ordered by the Court.

If a settlement or judgment in the Class Action results in compensation being payable to you, the Applicants will ask the Court (who has the power to make the below orders) to make an order that a portion of the compensation be used to remunerate the lawyers for the value of their work, the expenses and outgoings (disbursements) they incurred, and the financial risks they took, in running the Class Action (a **Solicitors' CFO**). If it makes a Solicitors' CFO, the Court has power to decide what portion of the compensation should be paid to the solicitors, and will set a proportion that the Court considers fair and reasonable in all the circumstances. The solicitors will not ask the Court to approve an amount that is greater than what a third party litigation funder would seek for funding this proceeding, which is up to 30% of the total recovery plus reimbursement of its out-of-pocket costs."

111 On the other hand, the draft amendment to the existing costs agreement between the first respondent to these appeals ("R&B Investments") and its solicitors contemplates a proposed SCFO ("the Addendum SCFO") which does not entirely reflect the SCFO described in the proposed notice. That amendment treats the legal costs and disbursements incurred by the solicitors separately from the Addendum SCFO. Legal costs and disbursements would be shared among the group members (including the Class Action Applicants) "pro rata in proportion to their respective recoveries as a result of the proceeding or otherwise as the Court

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119 *Supreme Court Act 1986* (Vic), s 33ZDA(1).

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may direct" and, separately, the solicitors would be "remunerated for [their] risks in funding the legal costs and disbursements" by payment of a percentage of the sum recovered as a result of the proceeding.

112 On one interpretation of the Addendum SCFO, which appears to match the terms of the question reserved, that SCFO could involve a fixed amount for legal costs and disbursements subtracted from any recovery by group members together with a further subtraction of a percentage of the recovery to "remunerate[]" the solicitors for their risk, with the percentage to be authorised by the Federal Court. There are three aspects to that risk to be remunerated: the risk that the proceedings will fail and the solicitors will have to bear all of the costs incurred in advancing the group litigation; the risk of providing security for costs and losing that money if the action fails; and the risk of an adverse costs order.

113 That view of an SCFO, which attempts (with some strain) to separate the components of risk from the legal costs and disbursements incurred, need not be considered on these appeals. As senior counsel for the Class Action Applicants properly accepted, the intention was not to seek a percentage recovery only for the risk borne by the solicitors separately from the cost of the legal services (assuming that such a separation could be clearly made). Instead, the legal costs and disbursements as well as the remuneration for risk were sought as a percentage of any recovery by group members.

### **The parties to these appeals**

114 The present appeals are brought from the whole of the judgment of the Full Court of the Federal Court of Australia<sup>120</sup> below answering a reserved question in a representative proceeding commenced by the Class Action Applicants (namely, R&B Investments and Mr Furniss) against the third respondent ("Blue Sky", which is a company in liquidation), some of Blue Sky's former directors (Mr Kain and Mr Shand), and Blue Sky's former auditor ("Ernst & Young"). Mr Kain, Mr Shand, and Ernst & Young are the respective appellants in the separate appeals ("the respective appellants").

### **The dead letter of this Court in *BMW Australia Ltd v Brewster***

115 In 2019, in *BMW Australia Ltd v Brewster* ("Brewster"),<sup>121</sup> a majority of this Court poured cold water upon CFOs. Relevantly for the Federal Court of Australia, the majority held that s 33ZF(1) of the *Federal Court of Australia Act 1976* (Cth) did not provide power for a CFO to be made prior to settlement or

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**120** *R&B Investments Pty Ltd v Blue Sky Alternative Investments Ltd (In liq)* (2024) 304 FCR 395.

**121** (2019) 269 CLR 574.

judgment.<sup>122</sup> Despite the extraordinary breadth of that provision, empowering the Court to make "any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding", the plurality judgment of Kiefel CJ, Bell and Keane JJ held that the power to make a CFO prior to settlement or judgment could never fall within the provision. Their Honours identified s 33ZF(1) as being concerned with an asserted "radically" different question from "whether an action *can* proceed at all", namely "*how* an action should proceed in order to do justice".<sup>123</sup>

116 In explaining this asserted radical difference based (apparently) on the words requiring justice to be done "in the proceeding",<sup>124</sup> the plurality relied heavily upon assertions of context and purpose. As Mr Kain and Ernst & Young submitted, many of those contextual and purposive considerations are equally applicable to the time of settlement or judgment as they are to the early stages of a proceeding. The plurality accepted that the Court had power to make an FEO under s 33ZF but observed that "a CFO seeks to impose an additional cost by imposing new obligations on the unfunded group members".<sup>125</sup> Their Honours held that s 33ZF(1) was a "supplementary or gap-filling provision"<sup>126</sup> and was limited to the power to make orders that would "advance the effective determination by the court of the issues between the parties to the proceeding".<sup>127</sup>

117 The above remarks by the plurality, and other remarks by the plurality,<sup>128</sup> strongly suggest that the reasoning of the plurality was intended to apply also to the making of a CFO at the time of settlement or judgment. But if the essential reasoning of the plurality were to be understood as preventing the making of a CFO under s 33ZF(1) even at the time of judgment,<sup>129</sup> neither that essential reasoning nor the question being addressed by the plurality was concerned with the application of other provisions of Pt IVA of the *Federal Court of Australia Act* (of which s 33ZF formed a part) at settlement or judgment.

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122 *Brewster* (2019) 269 CLR 574 at 589 [3], 624 [124]-[125], 625 [128], 631 [145]-[146], 638 [170]. See also at 628 [135], 632 [149].

123 *Brewster* (2019) 269 CLR 574 at 589 [3] (emphasis in original).

124 See *Federal Court of Australia Act* 1976 (Cth), s 33ZF(1).

125 *Brewster* (2019) 269 CLR 574 at 613 [88]-[90].

126 *Brewster* (2019) 269 CLR 574 at 606 [70].

127 *Brewster* (2019) 269 CLR 574 at 600 [50].

128 *Brewster* (2019) 269 CLR 574 at 612 [87], 613 [90].

129 *Brewster* (2019) 269 CLR 574 at 613 [90]. But compare 602 [54].

118 The other members of the majority were Nettle J and Gordon J. Like the plurality, Nettle J reasoned that the broad terms of s 33ZF(1) suggested that the provision was only in the nature of a "supplementary power".<sup>130</sup> Gordon J held that Pt IVA of the *Federal Court of Australia Act* as a whole did not empower the Court to make a CFO at any time.<sup>131</sup> Although this aspect of her Honour's reasoning reflected the general tenor of the plurality's reasons, it was not a matter that was essential to the reasons of the plurality and was not part of the ratio decidendi of *Brewster*.

119 In these appeals it was submitted, with some force, that there were "many examples" that show why the reasoning of the plurality was "plainly wrong" as a matter of law as well as "factually wrong" to the extent that the reasoning suggested that an FEO will always involve less cost for group members (compared with a CFO).<sup>132</sup> It was submitted that the plurality's reasons did not address important features of the dissenting judgments. In the course of these submissions, this Court was also referred to a powerful decision of the Court of Appeal of New Zealand,<sup>133</sup> which rejected the reasoning of the plurality in *Brewster*. Moreover, the Court was shown how the Federal Court has spent the last five years developing informal techniques to manoeuvre around the decision, reducing the effect of the majority judgments in *Brewster* to the point where, as Beach J astutely observed, "one can only wonder what the practical difference is" between the unauthorised CFOs proscribed by *Brewster* and the informal techniques developed.<sup>134</sup>

120 The premise of the informal techniques is that, contrary to the tenor of the majority judgments in *Brewster* although not contrary to the ratio decidendi of that case, the Federal Court has power to make a CFO upon settlement or judgment. On that premise, the most obvious informal technique is for judges to give indications "at case management hearings that they may be favourably disposed to making a settlement CFO in due course if the occasion arises".<sup>135</sup> Such an indication is not binding as to the terms of any final CFO made. But neither is an interlocutory CFO binding as to the terms of any final CFO made. Indeed, the parties might obtain more clarity and certainty by a strongly expressed informal

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130 *Brewster* (2019) 269 CLR 574 at 624 [124]. See also at 624 [125], 625 [128].

131 *Brewster* (2019) 269 CLR 574 at 628 [135], 632 [149]. See also at 630 [141], 631 [145]-[146], 638 [170].

132 See *Brewster* (2019) 269 CLR 574 at 612-613 [85]-[90].

133 *Simons v ANZ Bank New Zealand Ltd* [2024] 3 NZLR 485 at 518 [133]-[134]. See also at 514 [112]-[114].

134 *Elliott-Card v McDonald's Australia Ltd* (2023) 301 FCR 1 at 25 [128].

135 *Elliott-Card v McDonald's Australia Ltd* (2023) 301 FCR 1 at 25 [128].

view about the terms of a CFO that might be made on settlement or judgment than a weakly expressed view supporting the terms of an interlocutory CFO. The reasoning of the majority of this Court in *Brewster* has thus been reduced almost to a dead letter.

### **The attempts on these appeals to inject life back into *Brewster***

121 The background to these appeals is conveniently set out in the reasons of Gordon, Steward, Gleeson and Beech-Jones JJ. The respective appellants' submissions in relation to the reserved question essentially involved two steps. First, the respective appellants sought to extend the ratio decidendi of this Court in *Brewster*, submitting that the Federal Court of Australia has no power to make a CFO upon settlement or judgment under any provision of Pt IVA of the *Federal Court of Australia Act*. Secondly, the respective appellants submitted that even if there is power to make a CFO upon settlement or judgment, s 183 of the *Legal Profession Uniform Law* (NSW) ("the LPUL") prohibits the Federal Court of Australia from making an SCFO.

122 The Class Action Applicants resisted this Lazarus-like attempt to inject life back into *Brewster*. First, they submitted that notwithstanding the tenor, or express reasoning, of the majority judgments in *Brewster*, the Federal Court has power to make a CFO on settlement or judgment under s 33V(2) (in the case of a settlement) or s 33Z(1)(g) (in the case of a judgment) of the *Federal Court of Australia Act*. For abundant caution (which was unnecessary for the reasons explained above), the Class Action Applicants submitted that, to the extent that *Brewster* decided otherwise, it should be re-opened and overruled. Secondly, the Class Action Applicants said that s 183 of the LPUL does not prohibit the making of an SCFO.

123 For the reasons below, the Class Action Applicants' powerful submissions should generally be accepted. The tenor of the reasoning in *Brewster* should not be applied and the decision should not be extended. The ratio decidendi of *Brewster* should be left as a dead letter and not extended to the power to make CFOs upon settlement or judgment. The open-textured provisions of s 33V(2) and s 33Z(1)(g) of the *Federal Court of Australia Act* empower the grant of a CFO on, respectively, settlement or judgment. But although s 183 of the LPUL does not directly prohibit the making of an SCFO, neither s 33V(2) nor s 33Z(1)(g) empowers the making of an SCFO. Both of those provisions must be applied in a manner that ensures coherence between s 183 and the *Federal Court of Australia Act*.

### **A power to make a CFO upon settlement or judgment**

124 Section 33V(2) of the *Federal Court of Australia Act* relevantly provides that if the Court gives approval for a settlement, "it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court". Section 33Z(1) provides that in "determining a matter in a

representative proceeding" (where, in context, "matter" means nothing more than any issue in the proceeding), the Court may determine issues of law and fact and make various remedial orders including, in s 33Z(1)(g), "such other order as the Court thinks just".

125 Like s 33ZF(1) of the *Federal Court of Australia Act*, ss 33V(2) and 33Z(1)(g) might also attract the descriptions used by the plurality in *Brewster*<sup>136</sup> of "supplementary" or "gap-filling". But, with respect to the reasoning of the plurality, those descriptions are question-begging. Describing the provisions as supplementary says nothing about how far the supplement extends. So too does describing the provisions as "gap-filling" say nothing about the gaps that need to be filled. Indeed, for the same reasons that I gave in *Brewster*,<sup>137</sup> the wide terms of ss 33V(2) and 33Z(1)(g) fall within the category of powers that are "not to be read by making implications or imposing limitations not found in the words used". The Class Action Applicants sought refuge in the words used in ss 33V(2) and 33Z(1)(g) in separate ways.

126 As to the power in each of ss 33V(2) and 33Z(1)(g) to make orders that are "just", Mr Kain and Ernst & Young in particular submitted that the concept of justice which is applied in the identification of the scope of the power is confined by reference to context and purpose. It is not "palm tree justice".<sup>138</sup> That submission echoed the approach of the plurality in *Brewster*,<sup>139</sup> where their Honours said, in support of a conclusion that the making of a CFO prior to settlement or judgment was beyond the scope of s 33ZF(1), that "[i]t is not appropriate or necessary to ensure that justice is done in a representative proceeding for a court to promote the prosecution of the proceeding in order to enable it to be heard and determined by that court".

127 It is not appropriate to confine an intentionally broad reference to justice by having regard to individual perceptions of an appropriate, or preferred, policy effect of legislation. For the reasons I gave in *Brewster*,<sup>140</sup> the making of CFOs can comfortably fall within the broad conception of justice. To the extent that the reasoning to the contrary by the plurality was an essential part of their reasons in *Brewster*, that reasoning was based upon the association of "justice" in s 33ZF(1)

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136 (2019) 269 CLR 574 at 606 [70].

137 (2019) 269 CLR 574 at 641 [181], quoting *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 260-261 [11].

138 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 257-258.

139 (2019) 269 CLR 574 at 589 [3].

140 (2019) 269 CLR 574 at 641-644 [181]-[188].

with the words "in the proceeding".<sup>141</sup> At the very least, that reasoning, which I continue to reject,<sup>142</sup> should not be applied to confine the application of any other provision of Pt IVA of the *Federal Court of Australia Act* which does not contain the words "in the proceeding".<sup>143</sup>

128 In relation to s 33V(2) specifically, the respective appellants submitted that the word "distribution" was concerned only with payments to group members, in the same sense as "distribution" is used in ss 33M, 33Z and 33ZA. It was submitted, in different ways, that a "distribution" is concerned with giving effect to pre-existing entitlements rather than with creating new legal rights or new legal relationships that are not inter partes. In that respect, the respective appellants relied upon the statement in the Explanatory Memorandum for the legislation that introduced Pt IVA of the *Federal Court of Australia Act* that the provisions were not intended to confer "new legal rights".<sup>144</sup>

129 The word "distribution" cannot be confined in this way. Each of ss 33M, 33Z and 33ZA combines a reference to "distribution" with a reference to "group members". But the omission of any reference to "group members" in s 33V affords a wider scope for distribution. Most obviously, for example, the Court might order payment of some of the settlement funds to occur as a distribution to the administrator of the fund for the costs of administration. There is no basis to recognise an implication in s 33V(2) confining "distribution" only to "group members".

130 Nor is there any basis to accept the submission of the respective appellants that an explication of a meaning of the word "distribution" should confine the word's ambit to apply only to orders that give effect to payments based upon pre-existing legal rights and exclude orders that create new legal rights. There is some ambiguity in this submission since almost every legal order creates or changes legal rights. But it seems that the concept of impermissibly creating new legal rights was intended by the respective appellants to describe the creation by the Court of rights to a fund in favour of a party who had no pre-existing contractual entitlement to the fund.

131 The passage from the Explanatory Memorandum which refers to the absence of an intention to create "new legal rights" continues by saying that the

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141 See, eg, *Brewster* (2019) 269 CLR 574 at 589 [3].

142 *Brewster* (2019) 269 CLR 574 at 655-658 [213]-[222].

143 See *Brewster* (2019) 269 CLR 574 at 652 [207].

144 Australia, Senate, *Federal Court of Australia Amendment Bill 1991*, Explanatory Memorandum at 2 [3].



procedural reforms "build on the existing centuries old representative action procedure which is already available in the Federal Court and State and Territory Supreme Courts".<sup>145</sup> Orders made in those centuries old representative action procedures created new legal rights in the same sense as the rights created by a CFO. For instance, the FEO, in its original form in decrees of the Court of Chancery,<sup>146</sup> created new rights for solicitors against group members with whom they had no agreements. Equity has also long recognised powers to make orders for payment to a plaintiff from a common fund for the benefit of others where the fund had been realised by the work of the plaintiff.<sup>147</sup> The reference in the Explanatory Memorandum to the provisions of Pt IVA not conferring new legal rights must be understood as meaning that Pt IVA did not change the substantive law governing the issues joined between the parties to the dispute.

132 In relation to s 33Z(1)(g), the respective appellants, in particular Mr Shand, sought to confine the application of the words of that paragraph by reference to the unfortunately named<sup>148</sup> "*Anthony Hordern* principle",<sup>149</sup> which provides that one principle in the interpretation of a provision conferring a general power is that the provision should generally be interpreted so that it does not contradict the scope of an overlapping specific power in the same instrument. In other words, the so-called *Anthony Hordern* principle (that is, a specific power principle) is no more than an example of the ordinary language convention that general statements are not usually intended to contradict specific ones.

133 The specific powers that Mr Shand submitted should confine the application of s 33Z(1)(g) were the powers to make inter partes orders in

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145 Australia, Senate, *Federal Court of Australia Amendment Bill 1991*, Explanatory Memorandum at 2 [3].

146 *Brewster* (2019) 269 CLR 574 at 642 [183], citing *National Bolivian Navigation Co v Wilson* (1880) 5 App Cas 176 at 211-212.

147 Morgan and Wurtzburg, *A Treatise on the Law of Costs in the Chancery Division of the High Court of Justice*, 2nd ed (1882) at 201-203; Williams and Guthrie-Smith, *Daniell's Chancery Practice, being a Treatise on the Practice of the Chancery Division, and on Appeal Therefrom*, 8th ed (1914), vol 2 at 1081-1083.

148 See *China Life Trustees Ltd v China Energy Reserve and Chemicals Group Overseas Co Ltd* (2024) 27 HKCFAR 359 at 394 [103]-[104], citing *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* (2024) 98 ALJR 655 at 681 [120]; 418 ALR 202 at 233 and Stevens, *The Laws of Restitution* (2023) at 98.

149 See *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7.

ss 33Z(1)(a), 33Z(1)(b), 33Z(1)(c), 33Z(1)(d), 33Z(1)(e), 33Z(1)(f) and 33Z(2) of the *Federal Court of Australia Act*. Most pertinently, the latter provides that "[i]n making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled". This refers back to the specific powers in ss 33Z(1)(e) and 33Z(1)(f), which empower the Court respectively to "make an award of damages for group members ... being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies" and to "award damages in an aggregate amount without specifying amounts awarded in respect of individual group members".

134 The simple answer to the submission about s 33Z(2) is that s 33Z(2) is plainly not exhaustive. The specific powers in ss 33Z(1)(a) to 33Z(1)(f) do not exhaust the universe of monetary remedies in representative proceedings. For instance, orders for payment of a debt or for restitution of money based on a common law cause of action are remedies that fall only within s 33Z(1)(g). Even with respect to damages, s 33Z(2) does not require that in every case the whole of the award of damages must be paid to group members. For instance, s 33ZJ(2) empowers the Court to order payment from an award of damages of the whole or part of the excess of costs reasonably incurred by a person above the costs recoverable from the respondent by that person. Section 33Z(1)(g) might overlap with s 33ZJ(2) but s 33Z(1)(g) is not confined by s 33ZJ(2), particularly since s 33ZJ(3) provides that on an application under s 33ZJ, "the Court may also make any other order it thinks just".

135 For these reasons, ss 33V(2) and 33Z(1)(g) of the *Federal Court of Australia Act* empower the Court to make a CFO on settlement or judgment.

### **No power in New South Wales to make an SCFO that includes solicitors' costs**

136 The respective appellants submitted that it was not "just" for an SCFO to be made in New South Wales under ss 33V(2) and 33Z(1)(g) of the *Federal Court of Australia Act* due to legislative prohibitions in New South Wales, most relevantly s 183 of the LPUL. The respective appellants relied upon an assertion of a "legislative intent that the ... power must be exercised conformably with applicable prohibitions and requirements of State law".<sup>150</sup> This is not a matter of s 79 of the *Judiciary Act 1903* (Cth) picking up and applying s 183 of the LPUL as Commonwealth law. Rather it is a submission that the scope of what is "just" under ss 33V(2) and 33Z(1)(g) must be determined, consistent with the context and purpose of those provisions, by reference to common law principle as well as the requirements of the relevant State law where those provisions are being applied. That submission should be accepted: "State and Territory schemes of regulation of the legal profession form part of the context in which federal jurisdiction is exercised, and have an impact upon the practical circumstances in which the rule

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<sup>150</sup> *P v P* (1994) 181 CLR 583 at 602.

of law is maintained."<sup>151</sup> As will be explained, the requirements of State law include both statutory provisions and statutory policy.

137 In principle, there is no longer any reason why the powers to make a CFO upon settlement or judgment, respectively deriving from ss 33V(2) and 33Z(1)(g) of the *Federal Court of Australia Act*, cannot be exercised in favour of solicitors. Different views were taken in the 19th century. In 1896, reasoning of the Master of the Rolls was reported as follows:<sup>152</sup>

"In order to preserve the honour and honesty of the profession it was a rule of law which the Court had laid down and would always insist upon that a solicitor could not make an arrangement of any kind with his client during the litigation which he was conducting so as to give him any advantage in respect of the result of that litigation. That might be said to be on account of the fiduciary relation between the solicitor and the client. But the doctrine was founded upon a higher rule. The responsibility of persons engaged in the profession of the law was very great, and their conduct must be regulated by the most precise rules of honour. The Court thought that, unless the rule was carried out to its fullest extent, there would be a temptation to solicitors which they should not be subjected to."

138 Times have changed. That so-called rule of law and the policy ideas that underpinned it were concerned with agreements between solicitors and clients for remuneration where the remuneration would be affected by the outcome of the client's litigation. The rule of law, as expressed, extended to prohibit even no-win-no-fee arrangements. This rule of law has been rejected in Australia. This rule of law supported the crimes and torts of maintenance and champerty. As Gummow, Hayne and Crennan JJ said in their comprehensive historical analysis of these crimes and torts in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*:<sup>153</sup>

"Maintenance is the act of assisting the plaintiff in any legal proceeding in which the person giving the assistance has no valuable interest, or in which he acts from any improper motive. Champerty is maintenance in which the motive of the maintainer is an agreement that if the proceeding in which the maintenance takes place succeeds, the subject matter of the suit shall be divided between the plaintiff and the maintainer."

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151 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 352 [32].

152 *Pittman v Prudential Deposit Bank (Ltd)* (1896) 13 TLR 110 at 111.

153 (2006) 229 CLR 386 at 426 [68] fn 137, quoting Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (1877) at 86.

139 The crimes and torts of maintenance and champerty, and the rule supporting them, were always unstable and "[b]y the early twentieth century, the law of maintenance and champerty depended upon the application of qualifications and exceptions hinged, for the most part, about what was an item of property as distinct from a bare right to litigate".<sup>154</sup> In 1960, this Court described a no-win-no-fee agreement as one that might be reached, in appropriate circumstances, "with perfect propriety", although there remained at that time a prohibition against remuneration in proportion with the amount recovered in the litigation.<sup>155</sup> But, in principle, the solicitor is interested in the outcome of the litigation in cases of no-win-no-fee as well as cases where remuneration is expressed to be on the basis of a proportion of the amount recovered in the litigation.

140 Relevantly to New South Wales, in 1993 legislation was enacted which abolished the crimes and torts of maintenance and champerty.<sup>156</sup> Although that legislation did not affect contracts that were contrary to public policy or otherwise illegal,<sup>157</sup> the abolition of the crimes and torts of maintenance and champerty left no room for a "wider rule of law" or "wider rule of public policy" that included, without more, a policy against maintenance or champerty.<sup>158</sup> As the Full Court of the Federal Court said in this case:<sup>159</sup>

"[B]y a series of faltering steps, we have reached the position where open class proceedings grouping the claims of all persons affected by an alleged wrong are now the norm and there is a mature competitive market in which funders and solicitors are in competition for carriage of class actions which they subjectively perceive as having prospects of success (and hence bring the prospect of delivering a commercial return). This is the world any considerations based on public policy must now confront."

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154 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 430 [78].

155 *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 at 203.

156 *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW), ss 3-4. See now *Crimes Act 1900* (NSW), Sch 3, cl 5 and *Civil Liability Act 2002* (NSW), Sch 2, cl 2.

157 *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW), s 6.

158 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 433 [86].

159 *R&B Investments Pty Ltd v Blue Sky Alternative Investments Ltd (In liq)* (2024) 304 FCR 395 at 418 [104], citing *Perera v GetSwift Ltd* (2018) 263 FCR 1 at 10-15 [15]-[29].

141 Nevertheless, in a "cognate measure"<sup>160</sup> to the legislative abolition of maintenance and champerty in 1993, the New South Wales Parliament enacted legislation which included a precursor to what is now s 183 of the LPUL.<sup>161</sup> The Explanatory Note that accompanied the Bill containing the precursor provision explained that conditional costs agreements would be allowed but "fees may not be charged as a proportion of an amount recovered".<sup>162</sup> In the second reading debate for the precursor legislation, the Shadow Minister for Family, Community and Disability Services, the Hon R D Dyer, said:<sup>163</sup>

"In the United States of America it is possible to take a slice of the action, so to speak – it is quite common for that to happen. However, it is not the view of the Government or the Opposition that that should be contemplated in this State ... It is necessary for this cognate legislation to be introduced because there is a provision in the main measure to the effect that it is permissible for a legal practitioner and his client to enter into a conditional cost agreement, that is, an agreement where a fee is payable only if the matter is successful. In those circumstances, the legal practitioner is permitted to charge a premium of up to 25 per cent above the normal cost that would be payable. However – and this is a very important gloss on that doctrine – fees may not be charged as a proportion of the amount recovered. That will continue to amount to champerty, a slice of the action. But to the extent that the law is now to provide that a conditional cost agreement can permit a fee payable, encompassing a premium up to 25 per cent, it is necessary for this cognate measure to be brought before the House."

142 Section 183(1) of the LPUL, which is the successor to the relevant provision in that cognate 1993 legislation, provides as follows:

"A law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates."

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160 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 27 October 1993 at 4513.

161 *Legal Profession Reform Act 1993* (NSW), Sch 3, inserting s 188 into the *Legal Profession Act 1987* (NSW).

162 New South Wales, *Legal Profession Reform Bill 1993*, Explanatory Note at 5.

163 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 27 October 1993 at 4513-4514.

143 The civil penalty for a contravention of s 183(1) is 100 penalty units. Further, by s 183(3), a contravention "by a law practice is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention".

144 Section 183 is contained within Div 4 of Pt 4.3 of the LPUL, entitled "Costs agreements". That Division regulates costs agreements, including, in ss 181 and 182, "conditional costs agreements". A conditional costs agreement, by s 181(1), "may provide that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate" and, by s 182, may provide for the payment of an "uplift fee" which "must not exceed 25% of the legal costs (excluding disbursements) otherwise payable".

145 In reasoning upon which the Class Action Applicants relied in these appeals, the Full Court held that s 183 did not prohibit the making of an SCFO because the SCFO would be an order of the Court, not an agreement between the parties; any payment made would not be under a costs agreement but would be pursuant to the court order.<sup>164</sup> That reasoning should be accepted. It can immediately be accepted that the policy concern of the New South Wales Parliament was to prevent a law practice receiving contingency fees as a proportion of a client's recovery in litigation. But the manner in which that policy was sought to be vindicated was by the regulation of costs agreements. Indeed, the relevant objectives of Pt 4.3 of the LPUL concerning the costs agreement provisions are to ensure that clients of law practices can make informed choices about their legal options, and the costs associated with pursuing those options, and "to provide that law practices must not charge more than fair and reasonable amounts for legal costs".<sup>165</sup>

146 In particular, it would require s 183(1) to be rewritten for the terms of that provision to prohibit an agreement to make an application to a court for an SCFO. Such an agreement is not "a costs agreement under which the amount payable ... is calculated ...". If a court makes an SCFO, the amount payable is "under" the court order in the broad and ordinary sense that it is "governed, controlled, or bound by; in accordance with" the court order.<sup>166</sup> It is not, in anything other than

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**164** *R&B Investments Pty Ltd v Blue Sky Alternative Investments Ltd (In liq)* (2024) 304 FCR 395 at 414 [85]-[86].

**165** LPUL, s 169.

**166** *Rinehart v Welker* (2012) 95 NSWLR 221 at 248 [125], quoting *BTR Engineering (Aust) Ltd v Dana Corporation* [2000] VSC 246 at [24].

the most attenuated sense,<sup>167</sup> "under" the agreement to make an application to the court. If there is power for a court to make an SCFO, then any agreement to seek an SCFO creates no "amount payable"; nor does it say anything about how that amount payable is calculated.

147 Of course, the meaning of a provision is not confined by the semantic content of its words where the intention of Parliament is sufficiently clear. But although the New South Wales Parliament had a broad policy of prohibiting contingency fees, that policy was vindicated through a prohibition upon terms of costs agreements, not upon agreements to seek orders to that effect from a court. The policy was vindicated by proscribing particular terms (however expressed) of a costs agreement ("under which the amount payable ..."), and by enforcing that proscription by the threat of a civil penalty of 100 penalty units and the possibility of findings of unsatisfactory professional conduct or professional misconduct.

148 Although an agreement to apply to a court for an SCFO does not fall within the terms of s 183, there is an immediate tension between the clear policy of s 183 (to prohibit contingency fees) and the process by which the SCFO in this case is proposed to be sought. As the respective appellants correctly submitted, the "implicit legislative policy" is one "tending against the payment of contingency fees". The scope of what is "just" under ss 33V(2) and 33Z(1)(g) of the *Federal Court of Australia Act* is broad, and is not confined by the terms of the legislation of the State or Territory in which the concept of justice is applied. However, the application of justice, and thus the scope of what is "just", must also respect the policy of such legislation. Whether this dimension of justice is described as the "policy of the law" independent of any "express or implied prohibition in the statute itself"<sup>168</sup> or as the "coherence" of the law,<sup>169</sup> that policy can have substantive effect in shaping legal rules, particularly where "the statutory purpose is protective of a class of persons".<sup>170</sup> The manner in which considerations of coherence are raised in this case concerns consistency between, on the one hand, the "underlying

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167 See *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 at 523: "possession of a head is an essential precondition of decapitation".

168 *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 432.

169 *Sullivan v Moody* (2001) 207 CLR 562 at 581 [55]; *Miller v Miller* (2011) 242 CLR 446 at 454-455 [15]-[16]; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 518 [34].

170 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 518 [34].

normative reasons or justifications"<sup>171</sup> adopted by the New South Wales Parliament in regulating costs agreements and, on the other hand, the application of open-textured provisions of Commonwealth legislation by reference to justice in New South Wales.

149 A coherent application in New South Wales<sup>172</sup> of the policy upon which the terms, in context, of s 183 of the LPUL are based precludes the broad concept of justice in ss 33V(2) and 33Z(1)(g) of the *Federal Court of Australia Act* from empowering the Federal Court to make an SCFO.

## Conclusion

150 Notwithstanding that most of the submissions of the Class Action Applicants should otherwise be accepted, the coherence of the law precludes the application of the powers in ss 33V(2) and 33Z(1)(g) of the *Federal Court of Australia Act* to make an SCFO in New South Wales. Future development of any power to make an SCFO in that State must be left to occur as a matter of legislative innovation. The appeals should be allowed and orders made as proposed by Gordon, Steward, Gleeson and Beech-Jones JJ.

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171 Fell, "The Concept of Coherence in Australian Private Law" (2018) 41 *Melbourne University Law Review* 1160 at 1200.

172 Compare *Supreme Court Act 1986* (Vic), s 33ZDA, discussed in *Bogan v Estate of Smedley* (2025) 99 ALJR 619.



JAGOT J.

### The question in the appeals

151 The sole question in the present matter is best defined as whether, in a representative proceeding under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) ("the FCA"), upon the settlement of or the giving of judgment in the proceeding under s 33V or s 33Z of that Act,<sup>173</sup> the Federal Court of Australia may make an order of the kind known as a "common fund order" ("CFO") providing for the distribution of funds to a "law practice" subject to the *Legal Profession Uniform Law* (NSW)<sup>174</sup> ("the NSW LPUL") other than as payment for costs and disbursements incurred in relation to the conduct of the proceeding.

152 For the purpose of answering this question, which is a re-worked version of the question which was reserved for the Full Court of the Federal Court of Australia to consider, the parties agreed that a CFO should be understood to mean: an order the effect of which is to require all group members (including those who have not entered into a funding agreement) to contribute equally to a payment to the litigation funder in respect of the "funder's commission", being an amount calculated as a percentage of the settlement or judgment sum including a premium for litigation risk, such an order being generally made at the same time as orders dealing with other expenses incurred in the conduct of a class action, the most significant usually being legal costs.

153 The Full Court (Murphy, Beach and Lee JJ) answered the version of this question which had been reserved for its consideration in the affirmative.<sup>175</sup> For the following reasons, the question must be answered in the negative.

### The terms of the question

154 The terms of the question as reformulated reflect several important considerations.

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173 See also ss 173 and 177 of the *Civil Procedure Act 2005* (NSW).

174 See *Legal Profession Uniform Law Application Act 2014* (NSW), s 4, which provides that the "Legal Profession Uniform Law set out in Schedule 1 to the *Legal Profession Uniform Law Application Act 2014* of Victoria – (a) applies as a law of this jurisdiction, and (b) as so applying may be referred to as the *Legal Profession Uniform Law* (NSW), and (c) so applies as if it were an Act".

175 By extension of the reasoning in *Elliott-Cardé v McDonald's Australia Ltd* (2023) 301 FCR 1 concerning a payment to a third party litigation funder, not being a law practice.

155 First, the reformulated question is confined to the availability of the power under ss 33V and 33Z of the FCA<sup>176</sup> because in *BMW Australia Ltd v Brewster*<sup>177</sup> this Court held by majority that s 33ZF of the FCA and s 183 of the *Civil Procedure Act 2005* (NSW) ("the CPA") (to the effect that "... the Court may ... make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding") did not empower the Federal Court of Australia or the Supreme Court of New South Wales, respectively, to make a CFO before settlement or discontinuance of, or judgment in, the representative proceeding.

156 Second, the reformulated question concerns the power of the Federal Court to make a CFO under s 33V or s 33Z of the FCA providing for the distribution of funds to a "law practice" subject to the NSW LPUL other than as payment for costs and disbursements incurred in relation to the conduct of the proceeding. While the question does not in terms extend to the power to make a CFO under the relevant provisions in favour of a litigation funder which is not a law practice under the NSW LPUL, it is necessary to determine the meaning and operation of the provisions, which inevitably raise this question.

157 Third, the reformulated question refers to the distribution of funds to a "law practice" subject to the NSW LPUL rather than to a "solicitor" as proposed in the question the Full Court considered because, under the NSW LPUL, a "solicitor" is a kind of "Australian legal practitioner" (a kind whose Australian practising certificate is not subject to a condition that the holder is authorised to engage in legal practice as or in the manner of a barrister only), "Australian legal practitioner" means "an Australian lawyer who holds a current Australian practising certificate", and "Australian lawyer" means "a person admitted to the Australian legal profession in this jurisdiction [New South Wales] or any other jurisdiction". In contrast, "law practice" is defined in a manner that covers all forms of "legal practice".<sup>178</sup>

158 Fourth, the reference in the reformulated question to a distribution of funds to a law practice "other than as payment for costs and disbursements incurred in relation to the conduct of the proceeding" is intended to reflect that the NSW LPUL defines "legal services" to mean "work done, or business transacted, in the ordinary course of legal practice" and "legal costs" to mean, relevantly, "amounts that a person has been or may be charged by, or is or may become liable to pay to, a law practice for the provision of legal services ... including disbursements".<sup>179</sup> It

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176 Provisions equivalent to the *Civil Procedure Act 2005* (NSW), ss 173 and 177.

177 (2019) 269 CLR 574.

178 NSW LPUL, s 6(1).

179 NSW LPUL, s 6(1).

follows that a distribution of funds to a law practice "other than as payment for costs and disbursements incurred in relation to the conduct of the proceeding" is intended to mean a payment to a law practice other than a payment of legal costs for legal services.

159 Fifth, the reformulated question arises in a context where s 183 of the NSW LPUL provides as follows:

- "(1) A law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.

Civil penalty: 100 penalty units.

- (2) Subsection (1) does not apply to the extent that the costs agreement adopts an applicable fixed costs legislative provision.
- (3) A contravention of subsection (1) by a law practice is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention."

160 An applicable "fixed costs legislative provision", as referred to in s 183(2) of the NSW LPUL, means a "determination, scale, arrangement or other provision fixing the costs or maximum costs of any legal services that is made by or under the Uniform Rules [the Legal Profession Uniform Rules made under Pt 9.2<sup>180</sup>] or any other legislation".<sup>181</sup>

161 Sixth, it will be apparent from these matters that the reformulated question involves resolving the relationship between the apparently plenary terms of ss 33V and 33Z of the FCA (being Commonwealth legislation) and s 183(1) of the NSW LPUL (being State legislation), albeit in a context where both statutory schemes (the regulation of representative proceedings and Australian lawyers and law practices) form part of laws intended to facilitate uniformity across jurisdictions in Australia.

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**180** See, eg, *Legal Profession Uniform General Rules 2015* (NSW) and *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW).

**181** NSW LPUL, s 6(1).

## Factual context

162 The reasons of the Full Court record that the "issue as to power arose because the applicants [representing the group members] and two firms of solicitors (Banton Group and Shine Lawyers) negotiated arrangements for the conduct and funding of this class action".<sup>182</sup> The Full Court noted that: "*first*, there is a part-heard application under ss 33X and 33Y of the [FCA], filed by the applicants, seeking orders notifying group members as to the basis upon which remuneration for the funding and conduct of the proceeding will be sought; *secondly*, if the proposed notice is approved, the arrangements between the applicants and their solicitors contemplate amendments to costs agreements, so as to oblige the solicitors to finance the proceeding (including by provision of security, and indemnity against adverse costs orders) and an acknowledgment that the applicants agree that the solicitors' remuneration will be in the form and value as determined by a subsequent order of the Court; and *thirdly*, as is evident from the above, if the answer to the question posed is in the negative (that is, the Court lacks power to make a Solicitors' CFO<sup>[183]</sup>), the applicants have foreshadowed an application to cross-vest this proceeding to the Supreme Court of Victoria in order to seek what has been described as a 'Group Costs Order' (GCO) pursuant to s 33ZDA of the *Supreme Court Act 1986* (Vic) ... or will proceed to attempt to obtain commercial litigation funding".<sup>184</sup>

163 The reference to s 33ZDA of the *Supreme Court Act 1986* (Vic) ("the Victorian SCA") is to the unique provision in that Act which provides that on application by the plaintiff in any group proceeding, the Supreme Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order "(a) that the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being the percentage set out in the order; and (b) that liability for payment of the legal costs must be shared among the plaintiff and all group members".

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182 *R&B Investments Pty Ltd v Blue Sky Alternative Investments Ltd (In liq) (Reserved Question)* (2024) 304 FCR 395 at 398 [10].

183 Defined as an order to the effect that, in addition to legal costs and disbursements, "Banton and Shine be further remunerated for their risks in funding the legal costs and disbursements by payment of such percentage of the Resolution Sum [sum recovered as a result of the proceeding] as may be approved by the Court": *R&B Investments Pty Ltd v Blue Sky Alternative Investments Ltd (In liq) (Reserved Question)* (2024) 304 FCR 395 at 398-399 [11].

184 *R&B Investments Pty Ltd v Blue Sky Alternative Investments Ltd (In liq) (Reserved Question)* (2024) 304 FCR 395 at 399 [14].

164 It follows from s 33ZDA of the Victorian SCA that a law practice subject to the *Legal Profession Uniform Law* (Vic) ("the Vic LPUL"),<sup>185</sup> which contains s 183(1), must be able to take and act on an instruction from a plaintiff to obtain an order under s 33ZDA without contravening s 183(1) of the Vic LPUL. As laws of the same State legislature (Victoria), s 33ZDA of the Victorian SCA, as the later legislation, would be taken to prevail over s 183(1) of the Vic LPUL to the extent of the inconsistency between the two. Beyond that, no question arises in these appeals as to the relationship between s 183(1) of the NSW LPUL (as a law of the State of New South Wales) and s 33ZDA of the Victorian SCA (as a law of the State of Victoria) given that s 4 of the NSW LPUL provides for its extraterritorial operation.

165 The original costs agreement between one of the law practices, Banton Group, and one of the applicants representing the group members records that the document, together with the General Terms of Business attached, "set out the terms of [Banton Group's] offer to provide legal services to [the applicant] and constitutes [Banton Group's] costs agreement and disclosure pursuant to the *Legal Profession Uniform Law* (NSW)". The original costs agreement also discloses, in cl 3, the then understanding of the law practice that the applicant intended to enter into a funding agreement with a litigation funder, pursuant to which the litigation funder would pay the law practice's invoices. The original costs agreement contains an acknowledgment of the applicant that "this engagement is an offer to enter into a costs agreement under s 180(3) of the *Legal Profession Uniform Law* (NSW) ...". The attached General Terms of Business include cl 26.1, which provides that "[t]his Engagement Agreement and [the applicant's] rights are governed by the *Legal Profession Uniform Law* (NSW) and the *Legal Profession Uniform General Rules 2015* (NSW)". The appeals were conducted on the basis that the other law practice, Shine Lawyers, was also subject to the same New South Wales legislation.

166 The proposed amendment to the original costs agreement between Banton Group and the applicant consists of a document styled "Addendum to Cost Agreement". The Addendum involves the insertion of a new cl 3A after cl 3 of the original costs agreement, including these provisions:

**"3A. ALTERNATIVE FUNDING ARRANGEMENTS**

3A.1 You have instructed us to seek Court orders establishing a funding arrangement in substitution for the ILP Funding Agreement described in Section 3 above.

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<sup>185</sup> *Legal Profession Uniform Law Application Act 2014* (Vic), s 4.

3A.2 Specifically you have instructed us to:

- (a) seek Court orders that or to the effect that your proceeding (NSD 665/2022) and proceeding NSD 948/2022 be consolidated (**Consolidated Proceeding**) upon terms that:
  - i. you remain one of two co-applicants in the Consolidated Proceeding and
  - ii. we and Shine Lawyers jointly be appointed as solicitors on the record to have carriage of the Consolidated Proceeding;
- (b) negotiate terms with Shine Lawyers for the two firms' joint carriage of the Consolidated Proceeding (**Consolidation Agreement**);
- (c) at an appropriate stage of the proceeding – to the extent permitted by law seek orders that or to the effect that:
  - i. legal costs and disbursements be shared between the co-applicants and the group members in the Consolidated Proceeding (together and severally **Claimants**) pro rata in proportion to their respective recoveries as a result of the proceeding or otherwise as the Court may direct (**Costs Reimbursement**); and
  - ii. we and Shine Lawyers be remunerated for our risks in funding the legal costs and disbursements (pursuant to the agreement described in this clause 3A) by payment of such percentage of the sum recovered as a result of the Consolidated Proceeding (**Resolution Sum**) as may be approved by the Court (**Solicitors' Common Fund Order** or **Solicitors' CFO**);
- (d) as soon as practicable in the proceeding – seek orders that notice be given to the Claimants of the matters in 3A.2(c).

3A.3 In the event that orders are made as described in clause 3A.2(d) then the following terms shall apply:

- (a) Banton Group will finance the Consolidated Proceeding (including security for costs and payment of any adverse cost orders ordered against you) as required by the Consolidation Agreement;

61.

- (b) Banton Group will indemnify you against any liability in respect of legal costs and disbursements, security for costs or adverse costs in or in connection with the Consolidated Proceeding;
- (c) In the event that a Resolution Sum (as defined below) is obtained in the Consolidated Proceeding or otherwise in connection with the claims that are the subject of the Consolidated Proceeding (**Claims**) then Banton Group will seek Costs Reimbursement and a Solicitor's CFO as described above;
- (d) Resolution Sum means any amount or amounts, or the value of goods or services, to which you or a group member becomes entitled in connection with or satisfaction or part satisfaction of the Claims, including such amount/s or value:
  - i. as a result of a settlement, judgment or arbitration; and
  - ii. provided by a respondent in the Consolidated Proceeding or any other person, including a person against whom any respondent claims any indemnity, apportionment or contribution.

3A.4 For the avoidance of doubt, by entering into this agreement:

- (a) you agree that we are to seek orders as described in this Section 3A;
- (b) you do not agree to any particular remuneration, or form of remuneration, to be paid to Banton Group from the Resolution Sum;
- (c) you agree that the form and value of remuneration to be provided to Banton Group will be determined by, and take effect pursuant only to, any order for Costs Reimbursement or Solicitor's CFO."

167 The appeals were conducted on the basis that the other law practice, Shine  
Lawyers, proposed amending its costs agreement in terms to the same effect.

168 The proposed notice to group members under ss 33X and 33Y of the FCA  
(CPA, ss 175 and 176) contains the following:

"The solicitors for the Applicants are financing these proceedings, by paying lawyers in their employ as well as barristers and other experts, and by taking on the financial risks of conducting the proceeding, including by

indemnifying the Applicants against adverse costs, and furnishing any security for costs ordered by the Court.

If a settlement or judgment in the Class Action results in compensation being payable to you, the Applicants will ask the Court (who has the power to make the below orders) to make an order that a portion of the compensation be used to remunerate the lawyers for the value of their work, the expenses and outgoings (disbursements) they incurred, and the financial risks they took, in running the Class Action (a **Solicitors' CFO**). If it makes a Solicitors' CFO, the Court has power to decide what portion of the compensation should be paid to the solicitors, and will set a proportion that the Court considers fair and reasonable in all the circumstances. The solicitors will not ask the Court to approve an amount that is greater than what a third party litigation funder would seek for funding this proceeding, which is up to 30% of the total recovery plus reimbursement of its out-of-pocket costs.

Some group members have previously entered 'litigation funding agreements' with International Litigation Partners No 10 Pte Ltd. If the Solicitors' CFO is made, it will wholly replace the ILP funding agreements."

### **Sections 33V and 33Z of the FCA and s 183(1) of the NSW LPUL**

#### *Brewster distinguishable*

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In contrast to s 33ZF of the FCA and s 183 of the CPA, which were the subject of consideration in *Brewster*, s 33V of the FCA (CPA, s 173) is a power available on approval by the Court of a settlement or discontinuance of a representative proceeding and s 33Z (CPA, s 177) is a power available on the Court making an order for an award of damages. To the extent relevant, these provisions of the FCA (which are in substantially the same terms as those in the CPA) are as follows:

#### **"33V [CPA, s 173] ...**

- (1) A representative proceeding may not be settled or discontinued without the approval of the Court.
- (2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court."

#### **"33Z [CPA, s 177] ...**

- (1) The Court may, in determining a matter in a representative proceeding, do any one or more of the following:



63.

...

- (e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies;
  - (f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members;
  - (g) make such other order as the Court thinks just.
- (2) In making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled.

..."

**"33ZF [CPA, s 183] ...**

- (1) In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

..."

170 The first and second respondents, by a notice of contention, sought leave to re-open the decision in *Brewster* and submitted that the decision should be overturned on the basis that, properly construed, s 33ZF of the FCA enables the Federal Court of Australia to make a CFO before settlement or discontinuance of, or the making of an order for an award of damages in, a representative proceeding.

171 There is insufficient justification in the circumstances of the present case to grant leave to re-open *Brewster*. The primary argument of the first and second respondents is that *Brewster* is distinguishable as the reasoning in *Brewster* depended on the specific terms of s 33ZF of the FCA, which are different from the terms of ss 33V and 33Z of the FCA. This primary argument must be accepted.

172 The proposed order in *Brewster* was to be made at an early stage of the proceeding, before settlement, discontinuance or judgment. As such, neither s 33V nor s 33Z of the FCA was available. Rather, power to make such an order, if it existed, depended on s 33ZF of the FCA. Whatever the merits of the competing views disclosed in the judgments in *Brewster*, there is a material difference between (on the one hand) a CFO being made as part of a settlement or discontinuance of, or the giving of a judgment including an award of damages in, a representative proceeding, the effect of each of which is the finalisation of the

substance of the proceeding, and (on the other hand) a CFO being made at an early stage in the representative proceeding to ensure adequate funding of the conduct of the proceeding.

173 In a court making orders to provide for the settlement or discontinuance of, or the giving of a judgment including an award of damages in, a proceeding, it is not uncommon for orders to be made incorporating adjustments for costs and expenses between the parties, which can extend to adjustments reflecting liabilities of parties to other persons at least to the extent those other liabilities are sufficiently connected to the matters in controversy between the parties. Such orders by way of adjustment are within the scope of s 22 of the FCA (*Supreme Court Act 1970* (NSW) ("the NSW SCA"), s 63), which provides that the Court "shall ... grant, either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him or her in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided".

174 Section 33V(2) of the FCA, in providing that on approval of settlement or discontinuance of a representative proceeding the Court "may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court", and s 33Z(1)(g) of the FCA, in providing that in determining a matter in a representative proceeding the Court may "make such other order as the Court thinks just", are to be understood in the broader context of s 22 of the FCA (NSW SCA, s 63). Accordingly, neither s 33V(2) nor s 33Z(1)(g) is to be construed as confining the Court to the making of orders providing for payments only to the parties to the proceeding. The power to make other orders as the Court thinks just in each provision ensures that, in furtherance of the powers in s 22 of the FCA (NSW SCA, s 63), the Court can also make orders adjusting the payments to any party by, amongst other things, determining liabilities of that party to another person, at least to the extent the liability to be determined is sufficiently connected to the representative proceeding. This power extends to circumstances in which there is an existing quantifiable liability and in which the terms of the order both constitute and quantify the liability. There can be no real doubt that the making of a CFO (understood as defined above) satisfies the required sufficiency of connection.

175 In addition, *Brewster* did not concern the making of a CFO in favour of a law practice regulated by the NSW LPUL but, rather, the making of a CFO before settlement, discontinuance or judgment in favour of a litigation funder which was not a law practice.

176 Accordingly, the correctness of *Brewster* does not arise for direct consideration in this matter. Given the "strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law, that such a course

[granting leave to re-open a decision] should not lightly be taken",<sup>186</sup> the factors identified as relevant to the grant of leave to re-open a decision of this Court<sup>187</sup> do not carry enough weight to result in that course being adopted. The outcome in *Brewster* depended on ordinary principles of statutory construction, the application of which may be reasonably contestable. The differences in reasoning between those Justices forming the majority is not particularly significant. The result in *Brewster* may be somewhat inconvenient but the first and second respondents' submissions recognise that, in practice, the result has not stymied the evolution of case management strategies appropriate to representative proceedings. Given that *Brewster* is a recent decision of this Court in which five of seven Justices decided that s 33ZF of the FCA and s 183 of the CPA did not enable the making of a CFO, the interests of continuity and consistency in the law outweigh such interest as might exist in this Court re-opening and re-deciding the very same question of statutory construction.

#### *Overview of responses to key arguments*

177 As will be explained, the five key arguments of the first and second respondents supporting a positive answer to the question in the appeals involve several misconceptions which seek to negate the relevance of the fact that the law practices, unlike any other litigation funder, are subject to specific regulation including by the NSW LPUL, s 183(1) of which provides that a law practice subject to the NSW LPUL must not "enter into a costs agreement" under which "the amount payable to the law practice" is "calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates".

178 First, even if a "costs agreement" in s 183(1) of the NSW LPUL means a costs agreement for "legal costs" as defined in the NSW LPUL (which, as will be explained, it does not), a law practice's risks in funding a representative proceeding (both in terms of not recovering funded costs and expenses and in being subjected to adverse costs orders) are within the definition of "legal costs" in the NSW LPUL as those risks are part of "business transacted, in the ordinary course of legal practice".

179 Second, and in any event, a "costs agreement" as referred to in s 183(1) of the NSW LPUL is not confined to "legal costs". So much is plain from the reference in s 183(1) to "a costs agreement under which the amount payable to the

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**186** *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1011 [17]; 415 ALR 254 at 259, quoting *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352 [70].

**187** *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439.

law practice, or any part of that amount ...". Properly construed, in context, such an "amount" is not confined to "legal costs".

180 Third, it is not to the point that the proposed addendum to the costs agreement does not itself embody an agreement by force of which there will be an amount payable to the law practice calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates. The proposed addendum to the costs agreement is an agreement "under which" an amount payable to the law practice is to be calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates. The interposition of the client agreeing to the law practice applying to the Court for the making of an order by which an amount to be paid to the law practice is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates does not take the costs agreement outside of the scope of the prohibition in s 183(1).

181 Fourth, the prohibition in s 183(1) is not just a matter relevant to the exercise of a discretion by the Court whether to make a CFO providing for the distribution of funds to a law practice subject to the NSW LPUL other than as payment for costs and disbursements incurred in relation to the conduct of the proceeding. Leaving aside the express power vested in the Supreme Court of Victoria by s 33ZDA of the Victorian SCA, ss 33V and 33Z of the FCA cannot be construed as enabling the Court to give effect to a costs agreement by which the law practice has contravened the prohibition in s 183(1) of the NSW LPUL, exposing the law practice to both the imposition of a civil penalty and a finding of unsatisfactory professional conduct or professional misconduct.

182 Fifth, the provisions of the FCA concerning proceedings, including representative proceedings, are to be construed in a context which assumes the existence of State and Territory legislation regulating the conduct of Australian lawyers and law practices. Once this is recognised, there is no inconsistency between the FCA as Commonwealth legislation and the State and Territory legislation regulating the conduct of Australian lawyers and law practices.

*"Risk services", "legal costs", "costs agreement": first and second arguments*

183 It is not in doubt that a law practice conducting litigation may act as a litigation funder. It may do so consistently with the NSW LPUL including by negotiating with a client a conditional costs agreement under s 181 of the NSW LPUL and a conditional costs agreement with provision for the payment of an uplift fee (meaning "additional legal costs (excluding disbursements) payable under a costs agreement on the successful outcome of the matter to which the

agreement relates")<sup>188</sup> not exceeding 25% of the legal costs (excluding disbursements) as provided for in s 182 of the NSW LPUL. A law practice may not do so, however, in contravention of s 183(1) of the NSW LPUL.

184 "Costs agreement" is not defined in the NSW LPUL. Rather, s 179 provides that a "client of a law practice has the right to require and to have a negotiated costs agreement with the law practice" and s 180 provides for the making of a costs agreement. Apart from the fact that a "costs agreement must be written or evidenced in writing" (s 180(2)) and a "costs agreement cannot provide that the legal costs to which it relates are not subject to a costs assessment" (s 180(4)), s 180 does not regulate the content of a costs agreement. The further regulation is in ss 181-183.

185 The first and second respondents submitted that the sole concern of Pt 4.3 of the NSW LPUL, in which s 183 is located, is "legal costs". On that basis, they contended that in referring to "a costs agreement under which the amount payable to the law practice ...", s 183(1) is confined to such amounts as constitute "legal costs". According to this argument, the proposed amendment to the original costs agreement provides for the payment of "legal costs" for "legal services" in cl 3A.2(c)(i) and the payment of non-legal costs for other services which the first and second respondents characterised as the "risk services" in cl 3A.2(c)(ii). The first and second respondents submitted that the "risk services" were not "work done, or business transacted, in the ordinary course of legal practice" and therefore did not form part of the "legal services" because there was no evidence that the risk of a law practice "funding the legal costs and disbursements" (as referred to in cl 3A.2(c)(ii) of the proposed amendment to the original costs agreement) would occur in the ordinary course of legal practice.

186 Assuming, for the moment, that s 183(1) is confined to a costs agreement dealing only with "legal costs", the purported distinction between "legal services" and "risk services" is spurious. That the NSW LPUL recognises that a law practice may provide "legal services" and other services<sup>189</sup> does not mean that a law practice is free to label some services as "legal services" and other services as non-legal services, merely because a client is prepared to accept that label to obtain the "legal services".

187 Section 183(1) does not refer only to work done in the ordinary course of legal practice. It refers to work done *or business transacted* in the ordinary course of legal practice. The words "business transacted" are of broad scope, and deliberately so. They recognise that the provision of "legal services" is not confined to doing "legal work" and contemplate that aspects of the provision of

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188 NSW LPUL, s 6(1).

189 See, eg, NSW LPUL, ss 37(a), 103, 107, 259.

"legal services" will evolve. A law practice can no more avoid s 183(1) of the NSW LPUL by characterising a service it provides as a non-legal service of taking on risk for liability to pay costs and expenses in litigation (be it of the law practice's own client or another party) than it can characterise a service it provides as a non-legal photocopying, printing or binding service or electronic document management service.

188 In particular, the mere fact that a thing has not been done before in a law practice does not mean it is not part of the "work done, or business transacted, in the ordinary course of legal practice". Technological and financing developments have transformed the provision of legal services over the last few decades. One or other law practice will have been the first to provide many aspects of the provision of legal services which have now become commonplace. Being the first mover in some aspect of the market for the provision of legal services does not take that aspect outside of the scope of "work done, or business transacted, in the ordinary course of legal practice". Nor, logically, could it do so. If a technological, financing or other evolution in the provision of legal services is advantageous it will be adopted by many law practices. Section 183(1) of the NSW LPUL is not to be construed on the basis that the first law practice to adopt an innovation in the provision of legal services is not doing work or transacting business in the ordinary course of legal practice, but subsequent adopters of the innovation are doing work or transacting business in the ordinary course of legal practice.

189 In any event, ss 181 and 182 of the NSW LPUL recognise that it is an ordinary part of legal practice for a law practice to provide legal services based on conditional costs agreements including the conditional payment of an uplift fee. It is inherent within such agreements that the law practice is providing a so-called litigation "risk service". While the law practices in this case may be proposing to accept a greater risk of exposure to liability than under a conditional costs agreement, the magnitude of the risk is not to the point. The point is that it is part and parcel of the ordinary course of legal practice that a law practice may enter into a costs agreement under which the law practice accepts both the risks of incurring costs and expenses and the risks of being exposed to adverse costs orders which the law practice cannot recover. Indeed, risks of the former nature are inherent in the ordinary business of any law practice in which the law practice does not require the payment of a fee into its trust account before providing the service. The additional risk of a law practice being exposed to an adverse costs order does not transform the risk from one which is part of "work done, or business transacted, in the ordinary course of legal practice" into something else.

190 Section 183(1) of the NSW LPUL also cannot be avoided by a law practice providing for legal costs under a costs agreement and costs for purported other services under another agreement. If, as a matter of objectively determined fact, the costs are an amount that has been or may be charged to "a person" or "a person" is or may become liable to pay to a law practice an amount "for the provision of legal services", the amounts are "legal costs" irrespective of the label by which the

law practice or the law practice and the person may choose to describe those amounts.

191 Further, the statutory language by which "legal costs" is defined involves amounts a person has been or may be charged by, or is or may become liable to pay to, a law practice "*for* the provision of legal services". The word "for" operates as a preposition indicating a relationship between the charging of or liability to pay the amount and the provision of the legal services. As the term is relational, its meaning depends on its context.<sup>190</sup>

192 The context is Pt 4.3 of the NSW LPUL. Section 169, in Pt 4.3, specifies that the objectives of that Part are:

- "(a) to ensure that clients of law practices are able to make informed choices about their legal options and the costs associated with pursuing those options; and
- (b) to provide that law practices must not charge more than fair and reasonable amounts for legal costs; and
- (c) to provide a framework for assessment of legal costs."

193 Relevant to both the second and the third of the responses to the key arguments identified above is that s 169(a) refers to clients making "informed choices about their legal options and the costs associated with pursuing those options", whereas s 169(b) and (c) refer to the charging and assessment of "legal costs". This distinction, between *the costs* a client may incur in pursuing legal options and the charging and assessment of "legal costs", reflects the structure and provisions of Pt 4.3. Accordingly, Div 2 of Pt 4.3 is specifically concerned with legal costs, which, by s 172(1), must be no more than is fair and reasonable in all the circumstances. Division 3 of Pt 4.3 is concerned with "costs disclosure", with s 174(1) providing that the required disclosure to the client is of "information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs". Division 4 of Pt 4.3 is concerned with "costs agreements". Division 5 of Pt 4.3 is concerned with "billing". Division 6 of Pt 4.3 is concerned with "unpaid legal costs". Division 7 of Pt 4.3 is concerned with "costs assessment" and under s 196 that Division "applies to legal costs payable on a solicitor-client basis".

194 Section 183(1) is in Pt 4.3, as are ss 181 and 182. In contrast to ss 181(1) and 182(2), which refer to "the payment of ... legal costs" and the payment of an "uplift fee" (meaning certain "additional legal costs") respectively, s 183(1) does not refer to "legal costs". It refers to *the amount* payable to the law practice under

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190 eg, *R v Khazaal* (2012) 246 CLR 601 at 613 [31].

a costs agreement. The reason it does so is readily ascertainable. By referring to amounts payable under a costs agreement, meaning all such amounts, the prohibition in s 183(1) against contingency fees is both clear in its terms and unambiguous in its scope.

195 The overall context of Pt 4.3 of the NSW LPUL, the regulation of lawyers' charging, reflects a legislative intention to ensure that the object in s 3(c) of the NSW LPUL of "the protection of clients of law practices and the protection of the public generally" is not undermined by a law practice being able to exploit a client's need to obtain "legal services" by any form of excessive charging in connection with the provision of legal services. This context reinforces that the required relationship between the amount charged and chargeable and the provision of the legal services need not be direct and immediate. If, in exchange for the legal services, the client must agree that there will be payable to the law practice an amount calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates, the amount so calculated will be for the provision of legal services and therefore will be within the definition of "legal costs" if the work done or business transacted is in the ordinary course of legal practice.

196 As noted, and in any event, even if the law practice did provide some service which was other than work done or business transacted in the ordinary course of legal practice, that would not prevent the application of s 183(1) to any costs agreement under which the client agrees that any amount will be payable to the law practice calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates. As may be accepted, the primary focus of Pt 4.3 is "legal costs" and it is "legal costs" alone which are subject to the disclosure and assessment regimes. However, that is no reason to construe s 183(1) as confined to legal costs when: the NSW LPUL recognises that some law practices may provide non-legal services;<sup>191</sup> nothing in Pt 4.3 confines a costs agreement to legal costs; s 183(1) does not refer to "legal costs" but to "a costs agreement under which the amount payable to the law practice ..."; and not confining s 183(1) to legal costs ensures the effective operation of the prohibition that provision embodies in furtherance of the overall objects of the NSW LPUL.

197 That s 183(1) operates in this manner is reinforced by the terms of s 182(2) of the NSW LPUL. Section 182(2) of the NSW LPUL permits a law practice to enter into a conditional costs agreement (that is, an agreement that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate) which provides for the payment of an uplift fee (being additional legal costs (excluding disbursements) payable under a costs agreement on the successful outcome of the matter to which the agreement relates) if the law

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191 See, eg, NSW LPUL, ss 37(a), 103, 107, 259.



practice has a reasonable belief that a successful outcome of the matter is reasonably likely and if the uplift fee does not exceed 25% of the legal costs (excluding disbursements) otherwise payable. By s 182(3) a conditional costs agreement that includes an uplift fee must: identify the basis on which the uplift fee is to be calculated; and include an estimate of the uplift fee or, if that is not reasonably practical, a range of estimates for the uplift fee and an explanation of the major variables that may affect the calculation of the uplift fee. By s 182(4) a law practice must not enter into a costs agreement in contravention of s 182 or of the Uniform Rules relating to uplift fees, under pain of a civil penalty.

198       Section 182 represents a carefully worked out scheme by which a law practice may be paid an amount exceeding the legal costs which would otherwise be payable to it if the law practice has taken on the risk of funding the proceeding. That risk includes the law practice not recovering any part of the amount it paid to fund the proceeding by obtaining a costs order in favour of its client and can extend to the risk of being liable to pay an adverse costs order against its client (as nothing in the NSW LPUL prohibits a law practice taking on that risk in a conditional costs agreement). Section 182 expressly: confines the circumstances in which payment of such an additional amount may be agreed (only if the law practice has a reasonable belief that a successful outcome of the matter is reasonably likely); imposes additional disclosure obligations on the law practice; and specifies that the amount of the uplift fee must not exceed 25% of the legal costs (excluding disbursements) otherwise payable.

199       In the face of this carefully prescribed scheme it is unlikely, to say the least, that the legislature intended that a law practice would be able to enter into a costs agreement under which any amount payable to the law practice could be calculated by reference to the amount recovered in the proceeding by characterising that amount as non-legal costs or the underlying agreement between it and its client as mere "instructions" to obtain a court order, or by not reducing the costs agreement to writing, or by agreeing that the client's liability to pay any such amount depends on the obtaining of an order of a court to that effect. The statutory scheme would be incoherent if a law practice, on the one hand, could not obtain more than a 25% uplift fee of legal costs in a conditional costs agreement and yet, on the other hand, could obtain far more than an additional payment of 25% of the legal costs by any of the mechanisms on which the first and second respondents relied in the present case.

*Costs payable by court order not by costs agreement: third argument*

200       As noted, the first and second respondents submitted further that s 183(1) of the NSW LPUL would not be engaged in this case because the law practices were not entering into a costs agreement by which the client agrees to pay to the law practice a contingency fee. Rather, the law practices were proposing to enter into a costs agreement by which the client would agree that the law practice will seek an order from the Court that the law practice be paid a contingency fee.

201 The prohibition in s 183(1), however, is against a law practice entering into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount which is recovered in the proceeding. The words "under which" are important. Again, like the word "for" in the definition of "legal costs", the words "under which" denote a relationship between the costs agreement and an amount being payable to the law practice calculated as a percentage of that which is recovered in the proceeding, and the nature of the required relationship depends on the context of the provision. Again, the protective purpose of the NSW LPUL, particularly s 183, indicates that "under which" in that provision should not be construed narrowly as meaning, for example, "by which" or "by force of which". Rather, to satisfy the requirement of "under which" in s 183(1) it will suffice if an amount of the prohibited kind is or will become payable by reason of, as a result or consequence of, or in pursuance of the costs agreement. That the amount is not determinable at the time of the costs agreement does not take the costs agreement outside the scope of s 183(1). That the amount is not and may never become payable if a contingency does not occur (the making of an order by the Court) does not take the costs agreement outside the scope of s 183(1). That the person liable to pay the amount is not the "client" of the law practice (such as a group member in a representative proceeding who is not the applicant) is immaterial. The contrary reasoning of the Full Court, that the present case involves nothing more than a promise by the law practices to make an application for remuneration as approved by the Court and that any payment made would not be pursuant to any bargain struck between the law practice and the client,<sup>192</sup> is irreconcilable with the objective character of the business being transacted between the law practice and the client and the terms of s 183(1).

202 In summary, a "costs agreement" within the scope of s 183(1) of the NSW LPUL means any agreement between a client and a law practice under which any amount is or will be payable to the law practice by any person being an amount calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates, irrespective of whether the obligation or liability of the person to pay any such amount is conditional or contingent on another event (including the making of an order by the Court to constitute the liability and to determine the amount of the liability). By s 180(2) such a costs agreement must be written or evidenced in writing. But if not so written or evidenced in writing, that merely involves a failure of the law practice to comply with s 180(2) of the NSW LPUL; it does not mean that there is no "costs agreement" as referred to in s 180(3). Further, no matter what language is used as between a client and a law practice to describe their agreement, the objective character of the business being transacted will be determinative of the existence of a costs agreement which contravenes s 183(1).

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192 *R&B Investments Pty Ltd v Blue Sky Alternative Investments Ltd (In liq) (Reserved Question)* (2024) 304 FCR 395 at 414 [85]-[86].

203 It follows that the precise terms of the proposed amendment to the costs agreement are not determinative but conveniently expose the problem. By proposed cl 3A.4 the client is to agree that, by entering into the agreement, the law practice is to seek the orders as described in proposed cl 3A. The orders in proposed cl 3A are a costs reimbursement order (as explained in cl 3A.2(c)(i)) and the so-called "Solicitors' CFO" (as explained in cl 3A.2(c)(ii)). The latter order, in terms, is for the law practice to be paid by group members a percentage of the sum recovered as a result of the proceeding (defined as the Resolution Sum). The proposed amendment to the costs agreement therefore involves a costs agreement under which (in the sense of by reason of, as a result or consequence of, or in pursuance of the costs agreement) an amount will be payable calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates. The proposed amendment to the costs agreement, accordingly, would contravene s 183(1) of the NSW LPUL.

204 The objective character of the business proposed to be transacted in the present case is obvious. In exchange for the law practices providing the legal services in conducting the representative proceeding the client is to agree that, if the Court so orders, the law practice will be paid an amount prohibited by s 183(1). Neither: (a) the interposition of an order of the Court as the mechanism by which that payment is to be achieved; (b) the contingent and conditional nature of the payment, which may not in fact be required as no order may be made; nor (c) the indeterminacy of the amount to be paid unless and until the Court makes the order, changes the nature of the agreement or takes it outside the scope of the prohibition in s 183(1) of the NSW LPUL.

*Prohibition conditions power not discretion to make CFO: fourth and fifth arguments*

205 No principle was identified which supports the argument that s 183(1) of the NSW LPUL may be relevant to the exercise of power by the Court to make the CFO in favour of a law practice but not to the existence of that power.

206 That it is "inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words"<sup>193</sup> does not mean that a law of the Commonwealth conferring power on a court automatically prevails over a law of a State which may condition the exercise of that power. This is because, in terms of the operation of s 109 of the *Constitution*, by which a law of the Commonwealth

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**193** *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421. See also *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 316; *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 260-261 [11].

prevails over an inconsistent law of a State, "the starting point for determining whether such inconsistency exists lies in an identification of the intended scope and operation of the Commonwealth law". In the ordinary course, if the legislative intent is that the jurisdiction or power under the Commonwealth law is not to be "confined or constrained by the prohibition or requirements of State laws", s 109 will operate so that the Commonwealth law is not so confined or constrained. If the legislative intent is that the jurisdiction or power under the Commonwealth law "must be exercised conformably with applicable prohibitions and requirements of State law, the jurisdiction conferred will, as a matter of construction, be accordingly confined with the result that there is no inconsistency for the purposes of s 109".<sup>194</sup>

207 It is apparent that the FCA, including ss 33V and 33Z, assumes the existence of State and Territory legislation regulating the conduct of Australian lawyers and law practices. Equally, the CPA and the NSW SCA assume that regulation by other laws of New South Wales. It is for this reason that, for example, s 37N(2) of the FCA (CPA, s 56(4)) provides that a party's lawyer must, in the conduct of a civil proceeding before the Court, conduct the proceeding in a way that is consistent with the overarching purpose set out in s 37M(1). This reflects, amongst other things, r 3.1 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW), by which a "solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty". The same duty underlies the power of the Court to order a lawyer to bear costs personally because of a failure to comply with the duty imposed by s 37N(2). The assumption is also apparent in several provisions of the *Federal Court Rules 2011* (Cth) ("FCR") and the *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR"), including, for example: (a) that a person may be represented in the court by a lawyer (FCR, r 4.01(1); UCPR, r 7.24(1)); and (b) the authority of a lawyer to accept service (FCR, r 10.22(1); UCPR, r 10.13).

208 As explained in *APLA Ltd v Legal Services Commissioner (NSW)*,<sup>195</sup> the "entire system of State regulation of the provision of services which include representing people in courts exercising federal jurisdiction ... assumes that such regulation is not of itself inconsistent with the *Constitution* or with federal law. ... Whatever system exists in relation to the structure, organisation and regulation of the legal profession, it forms part of the context in which federal laws operate, and in which the judicial power of the Commonwealth is exercised."<sup>196</sup> That assumption is embodied in s 55B(1) of the *Judiciary Act 1903* (Cth), by which,

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<sup>194</sup> *P v P* (1994) 181 CLR 583 at 601-602.

<sup>195</sup> (2005) 224 CLR 322.

<sup>196</sup> (2005) 224 CLR 322 at 348-349 [23]-[24]. See also *BHP Group Ltd v Impiombato* (2022) 276 CLR 611 at 619-620 [7].

relevantly, a person entitled to practise as a barrister or solicitor, or as both, in the Supreme Court of a State or Territory "has the like entitlement to practise in any federal court".

209        Given the context within which ss 33V(2) and 33Z(1)(g) of the FCA operate, there is no inconsistency between the vesting of power in the Court to "make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court" and "make such other order as the Court thinks just", respectively, and the prohibition in s 183(1) of the NSW LPUL on a law practice entering into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates. Accordingly, s 183(1) operates according to its terms. In so operating, it can never be just within the meaning of s 33V(2) or s 33Z(1)(g) of the FCA for the Court to make an order which gives effect to an agreement between a law practice and a client which contravenes s 183(1) of the NSW LPUL. That is, the making of such an order is outside the scope of the power so vested in the Court.

210        It is unnecessary to deal with the other arguments raised in the appeals. Those arguments do not directly arise for determination and in any event are incapable of providing a cogent answer to the properly determined scope of s 33V(2) and s 33Z(1)(g) of the FCA (CPA, ss 173 and 177) not extending to a power to make a CFO providing for the distribution of funds to a law practice subject to the NSW LPUL calculated as a percentage of the settlement or judgment sum, including a premium for litigation risk.

### *Conclusion*

211        By s 183(1) of the NSW LPUL the law practices cannot enter into an agreement with their clients the effect of which would be that any amount is or will be payable to the law practice calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates irrespective of whether the obligation or liability of the client to pay any such amount is conditional or contingent on another event (including the making of an order by the Court to constitute the liability and to determine the amount of the liability). The Court cannot make an order that would give effect to any such agreement in contravention of s 183(1) of the NSW LPUL under s 33V(2) or s 33Z(1)(g) of the FCA.

### **Orders**

212        For these reasons, the reserved question should be answered "No" and the orders proposed by Gordon, Steward, Gleeson and Beech-Jones JJ should be made.